Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1842

SAM GOLDMAN,
Petitioner,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., THE HONORABLE JAMES H. MEREDITH, CHIEF JUDGE, THE HONORABLE JOHN J. NANGLE, JUDGE, and W. H. BLUMENTHAL, SECRETARY OF THE TREASURY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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INTRODUCTORY STATEMENT

This Petition for Writ of Certiorari seeks review of two companion appellate proceedings arising from the same litigation in the District Court. The first proceeding, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, No. 78-1427, involved the appeal of a money judgment granted Respondent Merrill Lynch arising out of certain commodities transactions between

the parties. Petitioner seeks review, under Supreme Court Rule 19, upon the ground that the Eighth Circuit, in affirming the District Court, has so far departed from accepted standards of judicial conduct as to call for the exercise of this Court's supervisory power. To this extent, the Statement of the Case concerning this portion of the case is limited mainly to the facts necessary to set forth the issues presented to the Court of Appeals, and the improper manner in which it is contended that the Eighth Circuit disposed of those issues.

The remaining portion of this Petition seeks review of supplementary judicial proceedings that were brought to enforce the judgment pending the original appeal. These proceedings resulted in a second appellate proceeding before the Eighth Circuit, *United States ex rel. Goldman v. Meredith, et al.*, No. 78-1622. Petitioner seeks review of this proceeding on the grounds that the Eighth Circuit has decided an important question of federal law concerning the Treasury Regulations governing certain Treasury obligations which have not been, but should be, settled by this Court.

OPINIONS BELOW

The opinion of the Eighth Circuit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, No. 78-1422, was handed down on March 14, 1979, and is officially reported at 593 F.2d 129 (8th Cir. 1979), reproduced at A-4. This decision affirmed the judgment of the District Court in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, No. 76-852C(1), decided May 8, 1978, and officially reported at 451 F.Supp. 223. (E.D. Mo. 1978), and reproduced at A-32 as well as affirming the Order and Supporting Memorandum of the District Court of December 29, 1977 dismissing three of the four counts of Goldman's Counterclaim, which are not officially reported, but are reproduced at A-27.

The opinion of the Eighth Circuit in *United States ex rel. Goldman v. Meredith*, No. 78-1622, was handed down on April 24, 1979, and is officially reported at — F.2d — (8th Cir. 1979), and reproduced at A-14. This decision affirmed the decision and order of the District Court, which is officially reported at 80 F.R.D. 70 (E.D. Mo. 1978), and reproduced at A-38.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit in cause number 78-1422 was entered on March 14, 1979 (A-4). A timely Petition for Rehearing was denied by the Court on April 5, 1979 (A-42).

The judgment of the United States Court of Appeals for the Eighth Circuit in cause number 78-1622 was entered on April 24, 1979 (A-14). A timely Petition for Rehearing, or in the alternative for Stay of Mandate, was filed and denied as to the Petition for Rehearing, but granted as to the Stay of Mandate, on May 9, 1979 (A-43, 44). This Petition for Writ of Certiorari in both appeals has been filed within ninety days following the final consideration by the Court of Appeals in both cases. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Is it a departure from accepted judicial standards of review for a Court of Appeals to deny an appellant a new trial on an admittedly erroneously dismissed cause of action on the [incorrect] assumption that the appellant was nonetheless allowed to present evidence pertaining to the dismissed count under the aegis of the remaining portions of his case?

II

Is it a departure from accepted judicial standards of review for a Court of Appeals to sanction the District Court's deliberate disregard of evidence that would establish a positive, willful and intentional scheme to defraud a commodities investor simply because the scheme proved unsuccessful (despite resulting damage to the investor), where the anti-fraud provisions of the Commodities Exchange Act expressly declares even an "*attempt* to cheat or defraud" to be unlawful?

III

Is it a departure from accepted judicial standards of review for a Court of Appeals to permit the ultimate fact findings of a District Court to stand where the District Court (1) made admittedly erroneous fact findings concerning key underlying factual issues, and (2) has committed mistakes of law in failing to acknowledge the existence of the very cause of action to which the fact findings pertain?

IV

Is it a denial of an appellant's right to challenge a fact finding of a District Court as lacking "substantial evidence" for a Court of Appeals to decline to review that fact finding on the sole basis that a witness credibility issue was involved, and therefore required automatic deferral to the District Court, even though the fact finding centered around documentary evidence?

V

Does 31 CFR § 350.16(b) prohibit the Treasury Department from accepting judicial process or other means of execution for the purpose of executing upon book-entry Treasury bills in satisfaction of a money judgment?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved herein are the Commodity Exchange Act, 7 U.S.C. § 1 et seq., particularly § 6b, (A-1) and the Treasury Regulations governing book-entry Treasury bills, 31 CFR, part 350, in particular § 350.16(b) (A-3).

The pertinent parts of these enactments are as follows:
7 U.S.C. § 6b [pp. 856-57 (1976 ed.)]:

> It shall be unlawful (1) for any member of a contract market . . . or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale on any commodity for future delivery . . . for or on behalf of any other person. . .
>
> > (A) to cheat or defraud or attempt to cheat or defraud such other person; [or]
> > (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

31 CFR § 350.16(b) [pp. 785-86 (July 1, 1978 ed.)]:

> The Treasury will not under any conditions accept notices of pending judicial proceedings, or of judgments in favor of creditors, or others, of any claims whatsoever, for the purpose of suspending or modifying any book-entry account or any transaction in book-entry Treasury bills.

STATEMENT OF THE CASE

This action was initially brought by Respondent, Merrill Lynch, Pierce, Fenner and Smith, Inc. [hereinafter referred to as "Merrill Lynch"] as a diversity action under 28 U.S.C. §1332(a)(1), in the District Court for the Eastern District of

Missouri [cause number 76-852(c)(1)] to collect $119,145.00 it claimed Petitioner Sam Goldman [hereinafter referred to as "Goldman"] owed it after liquidation of a commodities margin trading account which Goldman had with Merrill Lynch, and from which he had purchased five Mexican Peso contracts.

Goldman counterclaimed in four counts. Count I alleged that Merrill Lynch had committed both common law and statutory fraud under the Commodity Exchange Act, 7 U.S.C. §6b by making certain alleged misrepresentations in May, 1976, through its agent, Stephen Palmen [hereinafter referred to as "Palmen"], that Mexican Peso contracts were safe investments without substantial risk, and that there would be no devaluation of the Peso prior to December 1, 1976, when a change of presidential administration was to take place.

Count II, which reincorporated Count I and 7 U.S.C. §6b as a basis for liability, alleged that Merrill Lynch, through Palmen, further engaged in a scheme to defraud Goldman by wrongfully attempting to involve him in an advanced commodity program offered by Merrill Lynch known as a $50,000.00 Guided Account Program. Under this program, qualified investors deposited $50,000.00 with Merrill Lynch to be used as margin money for the purchase of commodities futures contracts. However, before an individual could qualify for this program, he first had to be granted $50,000.00 in margin trading limits by Merrill Lynch, which in turn required that the individual be worth at least $500,000.00 to qualify for such limits. The crux of the fraud alleged was that Palmen, the broker, submitted false financial statements to his superiors, without Goldman's knowledge, indicating that Goldman, whose actual net worth was only $230,000.00, was worth $2,000,000.00 in an attempt to make Goldman appear qualified for participation in this program. The broker denied responsibility for the false financial statements, blaming Goldman, but did admit that he actively solicited Goldman's participation in this program (which generated a large volume of commissions) and that he did make

repeated requests that Goldman's trading limits, which were never more than $25,000.00, be raised to $50,000.00.

Palmen was still trying to interest Goldman in the $50,000.00 Guided Account Program when the Mexican government announced a "float" of the Peso on August 31, 1976, which resulted in a 44% drop in Peso values over an eight day period. This drop caused a corresponding depreciation in the value of Goldman's five Peso contracts (which had been purchased on margin of only $12,000.00), and resulted in his account being liquidated at a loss of over $119,000.00. While Goldman did not get into the Guided Account Program prior to his account being liquidated, he nonetheless claimed to have been damaged by the false financial statement that he alleged Palmen had submitted on him; Merrill Lynch having admitted that its basic initial decision approving Goldman to trade commodities and open a general commodities account was based solely on the financial statement submitted by Palmen. Under Merrill Lynch acceptance standards and rules, a minimum annual income of $25,000.00 was required to open such an account, and while the false financial statement indicated Goldman's income to be $50,000.00, in fact his annual income was only between $12,000.00 to $16,000.00.

Count III alleged a cause of action based upon Merrill Lynch's failure to observe the duties owed Goldman as a client relating to basic supervision and review of accounts and suitability requirements, as well as "know your customer" responsibilities. Liability was premised upon violation of such responsibilities both as a matter of law reflecting good brokerage practice, as well as Merrill Lynch's own self-imposed house rules and corporate policies (portions of which are reproduced in note 8 of the Eighth Circuit's Opinion, A-10-11).

Count IV, which alleged a breach of fiduciary duty relating to conflict of interest and alleged possession of inside information, was not involved on Appeal.

Prior to trial, on December 29, 1977, the District Court sustained Merrill Lynch's Motion to Dismiss Counts II, III and IV. The order and supporting memorandum are not reported, but are reproduced herein at A-27. Basically the District Court dismissed Count II as being largely repetitive of Count I, and that Count III, dealing with the rules violations, failed to state a recognized cause of action. The case was tried by the District Court sitting without a jury on February 21, 1978, with only Count I of Goldman's Counterclaim (concerning the alleged misrepresentations about the Peso) being formally before the Court. The District Court rendered its judgment on May 8, 1978 for Merrill Lynch giving it full judgment for $119,145.00, plus interest, and against Goldman on the remaining Count of his Counterclaim; finding that Merrill Lynch made no misrepresentations concerning the safety of the Peso.

An appeal was taken to the United States Court of Appeals for the Eighth Circuit on June 6, 1978, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, No. 78-1427. Goldman initially sought review of certain fact findings under the "clearly erroneous" standard of F.R.Civ.P. 52(a). Among the major fact findings challenged as lacking "substantial evidence" was the District Court's determination that Goldman himself, and not the broker, Palmen, was responsible for the false information furnished on the financial statement known as the New Account Information Form.[1] The Court of Appeals, however, declined to overturn this finding, stating that ". . . this finding was based to a large extent upon the district court's evaluation of the credibility of the witnesses, to which we defer." [A-10].

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[1] This document, exhibit 1, has been reproduced at A-45. There was never any question that this document was false, only as to who was responsible for it. The document was signed by the broker, Palmen, as well as his supervisor and office manager, Boynton Hussey, but not by Goldman (and in fact there was not even a signature line for the client), and stated the following information: That he was married (false, Goldman was a life-long bachelor); Age: 40 (false, age 6⁻); A manufacturer's representative: (false, Goldman was a lawyer, now semi-retired); was experienced in futures speculation (false, no such experience), and had a net worth of $2,000,000.00 (false, $230,000.00), with an annual income of $50,000.00 (false, $12,000.00 to $16,000.00). It was Goldman's contention that Palmen's mere uncorroborated verbal denial was not "substantial evidence" to contradict a written document bearing Palmen's signature. Moreover, it was submitted that two entries on the form for which Palmen did admit responsibility: that (1) he had known Goldman for "two months" and (2) his "relationship to the customer" was that of "friend," were admittedly false (Palmen never having met Goldman until the date the form was allegedly prepared), constituted conclusive admissions on the very face of the document that Palmen was responsible for its overall falsity. Goldman also introduced a copy of a personal and financial statement which he had coincidentally given to another brokerage company during this very same time period which accurately stated the foregoing background and financial information.

Goldman also challenged as being entirely without evidenciary basis the District Court's finding that Merrill Lynch originally extended him a $50,000.00 margin trading limit. Goldman argued that it was because his limits were only $25,000.00 that Palmen was motivated to falsify his financial statement to make him appear eligible for the $50,000.00 Guided Account Program. Therefore, if the District Court misunderstood this basic fact, then its ultimate determination about who prepared the false financial statement was also suspect. The Court of Appeals agreed that this was a clearly erroneous finding, noting that even Merrill Lynch had conceded that Goldman's margin trading limits were never more than $25,000.00, but concluded that this error did not prejudice Goldman's case. [A-8].

The remaining portion of Goldman's appeal dealt with the propriety of the District Court's dismissal of Counts II and III as a matter of law. Under Count II, Goldman argued that if in fact Palmen was responsible for preparation of the false financial statement as part of a scheme to defraud him, then it stated a private cause of action for violation of the Commodity Exchange Act, 7 U.S.C. §6b(A), (B).

The Court of Appeals acknowledged that a private cause of action exists for such violations of the Commodity Exchange Act [n.7, A-10], but determined that the dismissal was not prejudicial because it felt that Goldman was nonetheless allowed to present his statutory fraud claim under the aegis of Count I. The Court apparently adopted the District Court's conclusion that the statutory fraud alleged in Count II was basically the same fraud as alleged in Count I. *Id.* Furthermore, the Court of Appeals also concluded that "Although Counts II, III and IV were dismissed, the district court did permit appellant to introduce evidence relevant to these counts." [A-6].

Goldman sought a rehearing of this determination, wherein he challenged the basic assumptions underlying the Eighth Circuit's decision. He sought, without success, to demonstrate that the District Court, at trial, did not recognize his statutory fraud claim concerning the Guided Account Program, and disregarded any evidence offered in support of it; limiting its attention and consideration solely to the fraud alleged in connection with the safety of the Peso.[2]

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[2] Several times Goldman attempted to introduce evidence bearing upon the statutory fraud alleged under Count II, concerning the Guided Account Program, such as to explain the nature of the program, Palmen's formal request to raise Goldman's limits to $50,000.00, and so forth. Each time, these attempts were met with the following response by the Court:

> THE COURT: Well, I'll sustain the objection to anything about [the] Guided Investment Program for the reason that he didn't go into it. So it doesn't make any difference what it was." (Tr. 43-44).
>
> * * * * * * * *
>
> THE COURT: . . . the facts are, as I understand it, and you'll correct me if I am wrong, he did not get in this program. Is this right?
>
> MR. RADLOFF: That's correct, your Honor.
> THE COURT: All right. Then I don't want to hear anymore about this program.
>
> MR. RADLOFF: May I cite you one point. Part of our case, your Honor,—it's in two parts—even in Count I. It's common law fraud and it's also statutory violation of [the] Commodities Exchange Act, and under Section 6b it covers an attempt to cheat or to defraud, and that is a basis upon which we are——
>
> THE COURT: I understand that's an attempt, but he didn't get into it. (Tr. 50-51).
>
> * * * * * * * *
>
> THE COURT: Well, I think we're getting very far afield, and since this is before the Court, if you make it brief, I am going to let you get into it very briefly, but *I don't think it has one single, solitary thing to do with this lawsuit, because he never got into it. . . . and if they defrauded him in this Peso deal, that's one thing. If they didn't, then that's something else.* (Tr. 61-62).

Goldman also challenged the dismissal of Count III, which alleged a cause of action for numerous violations of Merrill Lynch's duties to "know your customer" and provide general supervision of the handling of his account. The Court of Appeals agreed with Goldman that he stated a cause of action, and that the District Court should not have dismissed Count III [A-13]. However, the Court concluded that the dismissal of this cause of action did not constitute reversible error because ". . . the district court permissibly found that appellant failed to prove fraud on the part of Merrill Lynch." *Id.*

Goldman, in his Petition for Rehearing, disputed the Court's disposition of Count III, arguing that he was not given a full and fair opportunity to prove the necessary conduct "tantamount to fraud" that would have established his cause of action. His contentions were two-fold. In the first place, he disputed the Court of Appeals' assumption that the District Court allowed him to introduce evidence relevant to the fraud alleged in Count II [A-6]; citing to the Court's attention the remarks of the District Court [reproduced in note 2, *supra*], which clearly indicated that the District Court was unwilling to consider other conduct that would constitute fraud. In the second place, it was contended that the District Court's admittedly erroneous fact

finding that Goldman had been extended $50,000.00 in margin trading limits [instead of $25,000.00] vitiated the fact finding process and the District Court's conclusion that Goldman failed to prove fraud. Goldman argued that he could not possibly hope to prove that Palmen falsified his financial statement for the purpose of raising his limits from $25,000.00 to the $50,000.00 necessary to participate in the Guided Account Program if the District Court was operating upon the mistaken assumption that his limits were already $50,000.00.

The Court of Appeals declined to reconsider the issues raised in this proceeding and denied Goldman's Petition for rehearing on April 5, 1979, from which Goldman now seeks review by this Honorable Court.

* * *

After the District Court had rendered its decision, and during the time the appeal of that decision was pending before the Court of Appeals in cause number 78-1427, Merrill Lynch attempted to execute upon its money judgment in the absence of a supersedeas bond being posted by Goldman. After its initial execution was returned unsatisfied, Merrill Lynch, pursuant to F.R.Civ.P. 69(a), conducted a judgment debtor examination which revealed that Goldman, who had previously maintained large sums (e.g., $50,000.00) in government Treasury bills, had converted most of his investments and assets into government Treasury bills in an amount totaling $205,000.00.

The particular Treasury bills held by Goldman are known as book-entry Treasury bills, and have only been available in recent years. They are unique in the sense that they are not evidenced by any definitive physical documents or engraved certificate, but rather exist only as entries on the books of the Treasury Department, for which the holder only receives a "receipt" as confirmation of the transaction. Under 31 CFR § 350.16(b) [A-3] it is stated that:

> The Treasury will not under any conditions accept notice of pending judicial proceedings, or of judgments in favor of creditors or others, or of any claims whatsoever, for the purpose of suspending or modifying any book-entry account or any transaction in book-entry Treasury bills.

Furthermore, under 31 CFR § 350.08, the ownership of book-entry Treasury bills may only be transferred by certified request of the depositor-owner.

Because of the uncertainty that these book-entry Treasury bills could be reached by garnishment or other execution directed against the United States Government, Merrill Lynch made application to the District Court initially seeking to temporarily restrain Goldman from transferring or cashing out his Treasury bills, and ultimately seeking a mandatory injunction requiring Goldman to execute the necessary forms to transfer the Treasury bills to Merrill Lynch.

On July 12, 1978, a Show Cause Order was issued by the District Court, ". . . why a temporary injunction should not be granted restraining Defendant from cashing out or transferring his ownership of the book-entry United States Treasury bills . . ." After a preliminary hearing, the District Court entered its order granting not only the preliminary prohibitory injunction, but also granting Merrill Lynch the mandatory injunction it was ultimately seeking; ordering Goldman to cash sufficient Treasury bills to satisfy the judgment plus interest, but staying enforcement of that portion of the order pending determination of the appeal of the underlying judgment.

Subsequently, on or about August 17, 1978, the Secretary of the Treasury filed an Answer and Return to the garnishment which had been previously served upon the Treasury Department. That Answer indicated that the Treasury Department held Treasury bills belonging to Goldman in the sum of $170,000.00 which, pursuant to the District Court's previous order directed

against Goldman, had been restrictively marked so that they could not be cashed or withdrawn. The Treasury Department further answered that this was a case of first impression since book-entry Treasury bills were a new form of government securities, and that the obligation of the United States in this form is not capable of physical delivery such as a "bond" or by delivering a check. The Treasury Department indicated that the Treasury bills would first have to be transferred through the Federal Reserve Bank Communications System into a book-entry account maintained by a member bank in the Federal Reserve System before execution sale could be had. The Treasury Department's Answer concluded, however, that it would abide by whatever order the Court might make concerning disposition of the Treasury bills.

Upon receiving this Answer from the Treasury Department, Merrill Lynch immediately applied to the District Court for an order directing the seizure and transfer of the Treasury bills through the Federal Reserve Communications System, in accordance with the procedures set forth by the Treasury Department.

Goldman challenged the propriety of these actions, in view of Treasury Regulation 31 CFR § 350.16(b), by seeking alternative writs of mandamus and prohibition against both the District Court and the Secretary of the Treasury in what became known as *United States ex rel. Goldman v. Meredith, et al.* No. 78-1622 in the United States Court of Appeals. The Eighth Circuit granted the preliminary relief sought by Goldman in its Order of September 5, 1978, which stayed any actions to enforce the judgment out of the Treasury bills, as well as continuing the preliminary injunction restraining Goldman from cashing out or transferring the Treasury bills, pending determination of the original appeal.

This appeal was argued and submitted with the main appeal. On April 24, 1979, after the main appeal had been affirmed,

the Court of Appeals rendered its decision. The Court first held that the mandatory injunctive relief sought was available and proper unless it served to circumvent a stated government policy prohibiting the attachment of the Treasury bills [A-20]. The Court then avoided this potential problem by holding that the Treasury Regulations did not prevent book-entry Treasury bills from being subject to judicial process and execution [A-25-26]. Goldman filed his Motion for Rehearing on May 3, 1979, which the Court denied on May 9, 1979. The Court did, however, grant its Stay of Mandate on that same date to allow Goldman to seek review by this Court because of the substantial question presented concerning the interpretation of these Treasury Regulations.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

The Actions by the Court of Appeals in the Main Appeal (No. 78-1427) Indicate Such a Substantial Departure From Accepted Standards of Judicial Conduct So as to Call for the Exercise of This Court's Supervisory Power.

Petitioner Sam Goldman sought review by the Court of Appeals raising allegations of error by the District Court as to both fact and law; many of which the Eighth Circuit was constrained to agree existed. Yet, by a process of isolating these errors, rather than considering their overall effect, combined with a reliance upon demonstrably faulty factual and legal assumptions, the Eighth Circuit has managed to characterize these errors as not "prejudicial" or "reversible." For the reasons that follow, Petitioner Goldman respectfully submits that this disposition of his appeal represents such a substantial departure from accepted standards of judicial appellate review as to call

for the exercise of this Court's supervisory power under its Rule 19.

First and foremost is the fact that the Court of Appeals has managed to minimize as harmless the improper dismissal of two entire counts of Goldman's counterclaim (II and III), which even it was constrained to agree stated recognized causes of action (A-10, 13). It rationalized the improper dismissal of Count III, the "Rules Violations," on the basis that Goldman failed to prove fraud in connection with these rules violations. (A-13). But how does Goldman prove fraud in relationship to a count that the District Court does not even recognize as stating a cause of action? How does Goldman prove fraud when three-fourths of his Counterclaim is improperly dismissed before trial, especially when those dismissed counts contain the allegations that Merrill Lynch failed to "know its customer" because of its agent's *fraudulent* falsification and concealment of Goldman's personal and financial background? And how does Goldman prove that Merrill Lynch's agent intentionally falsified his financial statement for the purpose of raising his margin trading limits from $25,000.00 to the $50,000.00 necessary for participation in the Guided Account Program when the District Court has the erroneous understanding that Goldman's limits were $50,000.00 all along? Indeed, how can the Eighth Circuit minimize this factual error as not prejudicial (A-8) when it forms one of the key factual premises of Goldman's case, and then justify the improper dismissal of Count III on the basis that the District Court did not find fraud? Clearly, the Eighth Circuit has engaged in circular reasoning to reach the desired result.

But the Eighth Circuit apparently justified its conclusion on the basis that "Although Counts II, III and IV were dismissed, the district court did permit appellant to introduce evidence relevant to these counts." (A-6). Even if this assumption was true, and it is not, it is still no excuse for the improper

dismissal of an entire cause of action. This Court has held before that a litigant should be ". . . accorded the right to prepare his case and plan the strategy of trial with the knowledge that the . . . [improperly dismissed count is] properly before the court." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 1823 (1973).

But the assumption of the Court of Appeals is not true. The District Court did not consider Goldman's evidence or contentions relative to the dismissed counts. The District Court's own remarks [reproduced in pertinent part in note 2, *supra*] make it clear beyond doubt that it was limiting its consideration solely to ". . . this Peso deal" [Count I], stating that anything else, especially the fraud alleged in connection with the Guided Account Program [Count II], had not a ". . . single, solitary thing to do with this lawsuit because he never got into it." (Tr. 61).[3]

Similarly, serious questions must be raised about the Court of Appeals sanctioning the dismissal of Count II, involving the more sophisticated scheme to defraud dealing with the Guided Account Program and the false financial statement. The Court of Appeals, while acknowledging that a violation of the statutory anti-fraud provisions of the Commodity Exchange Act gives rise to a private cause of action, refused to reverse and remand. It adopted the District Court's conclusion that this statutory fraud was raised in Count I, and held that it was given adequate consideration and ultimately rejected; even though it had to concede that this fraud ". . . was more explicitly set forth in Count II." n.7, A-10).

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[3] That the record contains any references to the Guided Account Program was mainly due to the stubborn persistence of Goldman's counsel who, in hindsight, would have been better off simply accepting the District Court's initial refusal to hear his evidence, thereby leaving the Court of Appeals no choice but to remand. But the District Court, in letting this evidence in, made it clear that it was doing so ". . . primarily for the purpose so that the record will show what the program is all about. I don't think it has a great deal to do with this lawsuit, but you seem to think it does." (Tr. 243).

But if Count II stated a cause of action, then it never should have been dismissed in the first place. If Merrill Lynch, through its agent, committed an *intentional act of fraud* in falsifying Goldman's financial statements, then Goldman had a right to fully present it; both as stating an independent cause of action under the Commodity Exchange Act, 7 U.S.C. § 6b(A)(B), and also to the extent that it would provide the fraud necessary to make the rules violations actionable under Count III. The dismissal of Count II cannot be justified on the assumption that it was repetitive of Count I, for it is not. Count I alleged a traditional face-to-face representation concerning the Peso's stability. Count II involved a separate and much more sophisticated scheme to defraud, of which Goldman was unaware, dealing with the Guided Account Program and the misrepresentation of Goldman's financial abilities. Furthermore, the above mentioned actions and statements of the District Court (notes 2 & 3, *supra*) make it clear that it did not treat Count II as being before the Court under the guise of Count I. In any event, the fact remains that Goldman was not ". . . accorded the right to prepare his case and plan the strategy of trial with the knowledge that . . . [Count II] was properly before the District Court." *McDonnell Douglas Corp. v. Green, supra.*

Still other questions exist concerning the Eighth Circuit's disposition of this case. Goldman challenged many of the fact findings of the District Court; an admittedly difficult process. In particular, Goldman sought to question the District Court's ultimate factual finding that it was he, and not Palmen, who was responsible for the preparation of the false financial statement. He challenged this finding on the bases that: (1) the District Court had committed errors of law in not recognizing the causes of action stated in Counts II and III, thereby necessarily vitiating its fact findings; (2) the District Court had committed underlying mistakes of fact in not recognizing Goldman's actual margin trading limits, which was imperative to understanding why Palmen had a motive to falsify the financial

statement; and (3) that there was no "substantial evidence" to support the District Court's finding.

While it is neither necessary nor proper to argue the evidence that was presented to the District Court [the basic contentions of which are set forth in note 1, *supra*], the fact remains that Goldman was entitled to a judicial review of the questioned fact finding, if only to have the reviewing court determine that it was supported by "substantial evidence." But for the Court of Appeals simply to defer to the District Court's finding on the basis that it involved a credibility issue (A-10) is to deny Goldman his right of review, no matter how limited. To say that there is an issue of credibility does not answer whether there was any substantial evidence to support that particular finding, especially when that finding centers on evidence, documentary in nature. *See generally, Gay Lib v. University of Missouri,* 558 F.2d 848, 853 (8th Cir. 1977).

The preceding discussion raises one last criticism of the Eighth Circuit's handling of this appeal. This concerns the fact that the District Court was totally unwilling to consider Goldman's allegations of fraud in connection with the Guided Account Program if it did not result in his participation. In effect, the attitude of the District Court, and one which the Court of Appeals has sanctioned, is that it will ignore an *intentional act of fraud* because the fraud did not succeed; even though Goldman was just as effectively damaged by the misrepresentation of his personal and financial abilities since it affected Merrill Lynch's treatment of him.

Certainly the failure of the scheme does not lessen its wrongfulness. But more important is the fact that the attitude of the Eighth Circuit runs afoul of Congressional intent in re-enacting the Commodity Exchange Act in 1974. Congress re-enacted and strengthened this Act for the very purpose of cracking down on the manipulative schemes, deceptions and frauds so prevalent

in the commodities field. *See Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103-104 (7th Cir. 1977). But both the District Court and the Court of Appeals have ignored Goldman's claim of fraud solely on the ground that the fraud failed. Can such an attitude be sanctioned by this Court when § 6b of the Act goes so far as to even make the "*attempt* to cheat or defraud" unlawful? If nothing else, a violation of this section must raise serious questions about Merrill Lynch's right to recover in this lawsuit.

Goldman, in his Petition for Rehearing, sought to demonstrate the Eighth Circuit the very errors which he raises in this Petition. And yet the Eighth Circuit ignored his arguments, still insisting that he has had his day in court; binding him to the "findings" of a trial that largely never took place. It has affirmed the decision of the District Court by relying upon a fact finding process that is riddled with errors of both fact and law. Such an attitude simply cannot be tolerated. The ultimate fact remains that the District Court improperly dismissed two entire counts of his Counterclaim which he had an absolute right to present from the very beginning of this case. For these reasons, Goldman respectfully submits that the Eighth Circuit has so far departed from accepted judicial standards of conduct, raising such serious questions about the proper functioning of the federal appellate system, that it calls for the exercise of this Court's supervisory powers.

II

The Interpretation of Whether 31 CFR § 350.16(b) Was Intended to Exempt Book-Entry Treasury Bills, a New Form of Government Obligation, From Judicial Process Presents an Important Federal Question Which Should Be Passed Upon by This Honorable Court.

The decision of the Eighth Circuit that 31 CFR § 350.16(b) does not insulate book-entry Treasury bills from judicial process was based largely upon the existence of general Treasury regulations that expressly provide for the judicial transfer of certain types of Treasury obligations, known as "transferable securities;" citing 31 CFR § 306.0, 306.100, 306.101 (A-23). It is respectfully submitted that the Eighth Circuit's reliance upon these general regulations to justify its interpretation of § 350.16 (b) is greatly in error.

In the first place, § 349.2, governing book-entry Treasury bills, states that such Treasury bills shall be subject to 31 CFR, part 306 only "to the extent applicable." However, an examination of § 306.100, reveals that it is applicable only to "*transferable* securities." Under the definitions provided in § 306.2(q), "Transferable Securities" are defined as:

> . . . securities which may be sold on the market and transfer of title accomplished by assignment and delivery if in registered form, or by delivery only if in bearer form.

By contrast, § 306.2(j) states that "Non-Transferable Securities" are:

> . . . those issued only in registered form which according to their terms are payable only to the registered owners or recognized successors in title to the extent and in the manner provided in the offering circulars or special applicable regulations.

It should be apparent that book-entry Treasury bills are not "transferable securities" as that term is used in § 306.100, upon which the Court of Appeals relied. *See* 31 CFR §§ 350.8; 350.-16(a).

Moreover, the inapplicability of §306.100 to book-entry Treasury bills is apparent on its face, for it requires the ". . . *presentation* of the securities . . ." as part of the outlined pro-

cedure. Yet, book-entry Treasury bills, as made clear by the Treasury Department's Answer to the garnishment, are not evidenced by any ". . . definitive security, the possession of which is physically transferable." Therefore, since book-entry Treasury bills do not exist in physical form, they are incapable of physical presentation, which should make it clear that they are not among the Treasury securities for which judicial transfer is contemplated under §306.100 et seq.

While holding that the Treasury bills were subject to judicial process, the Eighth Circuit conceded that it was "somewhat perplexed" by the language of 31 CFR §350.16(b), which, it admitted, seemed to say just what Goldman said it did. (A-23). Therefore, to bolster its holding, the Court deemed it wiser to narrowly construe the term "notice," as used in that regulation, to refer to something less than a judicial order or process; *e.g.*, "a letter referring to a judgment instead of a certified copy of the judgment." (n.9, A-23-24). Goldman respectfully submits that this interpretation is both strained and unjustified.

It is a well known rule of judicial construction that legislative and regulatory enactments should never be interpreted so as to render the provision meaningless. Yet, the Eighth Circuit's interpretation does just that. The non-judicial notices that the Court of Appeals refers to, such as a letter of a judgment creditor to a garnishee, have never been recognized as being entitled to any legal recognition, or having the power to attach assets and bring them into court. The result is that the Eighth Circuit has interpreted this Treasury regulation in such a way that it is meaningless in that it neither modifies nor changes the existing state of the law.

Moreover, an overall reading of the regulatory scheme set forth in 31 CFR, part 350, indicates that book-entry Treasury bills were to enjoy a special and unique status as government securities, rendering them almost untouchable by anyone other

than the owner. Section 350.16(a) makes it clear that the only provision for *involuntary* transfer of such Treasury bills is in situations where the original owner has ceased to exist as a legal or competent entity, in which case a duly appointed ***representative or successor-in-interest*** to the original owner will be recognized upon following the prescribed procedure. Conversely, nowhere in part 350 is provision made for the recognition of those claiming an interest in the Treasury bills *adverse* to the owner. Had the Treasury Department intended to provide for such judicial transfer and recognize executions pertaining to book-entry Treasury bills, it very easily could have done so, as it has in the case of other Treasury securities. But the absence of such a provision, coupled with the overall regulatory scheme of 31 CFR, part 350, and in particular the sweeping, all-inclusive language contained within § 350.16(b), would seem to indicate that a broad, rather than narrow, interpretation of that section is called for.[4]

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[4] Goldman would make it clear that he is not advocating that these regulations be used as a shield for fraud, for he recognizes that the necessary relief should be available where the circumstances manifest fraud. *Free v. Bland*, 369 U.S. 663, 670, 82 S.Ct. 1089, 1094 (1962). But it should be pointed out that Merrill Lynch has never raised, or even alleged, that Goldman has acted fraudulently towards them, and under these circumstances, such is not an issue in this case. *Id.* at 671/1094.

CONCLUSION

It is respectfully submitted to this Honorable Court that the questions raised in the original Appeal, No. 78-1427, present a compelling need for the exercise of this Court's supervisory powers to restore the credibility of the appellate process.

It is furthermore submitted that the issues presented in the supplementary appellate proceeding, No. 78-1622, present a compelling federal question of national importance concerning a new form of Treasury obligations through which substantial portions of the general revenues are raised. It is therefore respectfully requested that this Honorable Court issue its writ of certiorari to review both of the decisions below.

Respectfully submitted,

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Attorney for Petitioner

I hereby certify that the necessary copies of this Petition for Writ of Certiorari have been served upon all parties of record by depositing the same in the United States mails, first-class postage prepaid, addressed to respective counsel of record at their stated post office addresses.

STUART J. RADLOFF

APPENDIX

APPENDIX A

7 U.S.C. § 6b. **Contracts Designed to Defraud or Mislead; Bucketing Orders; Buying and Selling Orders for Commodities**

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person: or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

Nothing in this section or in any other section of this chapter shall be construed to prevent a futures commission merchant or floor broker who shall have in hand, simultaneously, buying and selling orders at the market for different principals for a like quantity of a commodity for future delivery in the same month, from executing such buying and selling orders at the market price: *Provided,* That any such execution shall take place on the floor of the exchange where such orders are to be executed at public outcry across the ring and shall be duly reported, recorded, and cleared in the same manner as other orders executed on such exchange; *And provided further,* That such transactions shall be made in accordance with such rules and regulations as the Commission may promulgate regarding the manner of the execution of such transactions.

§ 350.16 **Transactions in Regular Course—Notices Not Effective—Unacceptable Notices.**

(a) *Transactions in regular course—notices not effective.* Transfers of book-entry Treasury bills, payment thereof or reinvestment at maturity or any other transaction therein will be conducted in the regular course of business in accordance with this subpart, notwithstanding notice of the appointment of an attorney-in-fact, or a legal guardian or similar representative, or notice of successorship, the termination of an estate, the dissolution of an entity, or the death of an individual, unless the requisite request, proof, and the evidence necessary to establish entitlement under this subpart is received by the Bureau no later than ten business days prior to the maturity date of the bills.

(b) *Unacceptable notices.* The Treasury will not under any conditions accept notices of pending judicial proceedings, or of judgments in favor of creditors or others, or of any claims whatsoever, for the purpose of suspending or modifying any book-entry account or any transaction in book-entry Treasury bills.

APPENDIX B

United States Court of Appeals for the Eighth Circuit

No. 78-1427

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Appellee,
v.
Sam Goldman,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 17, 1978
Filed: March 14, 1979

Before Stephenson and McMillian, Circuit Judges, and Robinson,* Senior District Judge.

McMillian, Circuit Judge.

Appellant Sam Goldman appeals from a judgment entered by the District Court for the Eastern District of Missouri[1] in favor of appellee Merrill Lynch, Pierce, Fenner & Smith, Inc. (hereinafter Merrill Lynch). Merrill Lynch initiated the action to recover an alleged deficiency of $119,145.00 in appellant's commodities margin trading account.[2]

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* The Honorable Richard E. Robinson, Senior District Judge for the District of Nebraska, sitting by designation.

[1] The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri.

[2] The basis of jurisdiction was diversity of citizenship. Merrill Lynch is a Delaware corporation with its principal place of business in New York; appellant is a resident of Missouri.

For reversal appellant argues that the district court erred in (1) making certain findings of fact and conclusions of law, (2) not finding that false financial statements were submitted by broker Palmen and thus constituted a violation of the antifraud provisions of the Commodities Exchange Act, 7 U.S.C. § 6b, and (3) dismissing Count III of appellant's second amended counterclaim. For the reasons discussed below, we affirm the judgment.

In early May of 1976, appellant opened a commodities margin trading account with Merrill Lynch. Appellant's account executive was a broker named Stephen Palmen. Appellant eventually purchased five futures contracts through Merrill Lynch. These contracts were agreements to purchase one million pesos on a given maturity date at a given price. Unfortunately for appellant, on August 31, 1976, the Mexican government announced that it would no longer support the peso at the fixed rate of eight cents per peso and instead would permit the peso to "float." As a result, the peso decreased markedly in value. Appellant sustained an approximate loss of 44% of his entire investment.

Of more immediate concern, however, was the fact that the International Monetary Market substantially increased its margin requirements in light of the peso devaluation. On September 2, 1976, Merrill Lynch notified appellant of the increased margin requirements and requested appellant to deposit $125,000 in satisfaction thereof. Appellant did not do so. On September 8, 1976, Merrill Lynch sold appellant's five peso futures contracts at a loss of over $119,000 to appellant's account. This sale was pursuant to the broker-client Commodity Account Agreement.[3] The deficiency in appellant's account is the subject of this litigation.

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[3] The Commodity Account Agreement (Exhibit No. 2) is one of several forms filled out by persons opening commodities margin trading accounts. Basically, the agreement authorizes Merrill Lynch to

Appellant filed a counterclaim in four counts, which appellant characterized[4] as alleging common law fraud (I), statutory fraud in violation of the Commodities Exchange Act, 7 U.S.C. § 1 *et seq.* (II), breach of Merrill Lynch's "duty to know your customer" and to supervise the account (III), and conflict of interest (IV). Although Counts II, III and IV were dismissed,[5] the district court did permit appellant to introduce evidence relevant to these counts. After a trial, the district court entered its judgment in favor of Merrill Lynch for $119,145.00 plus interest. The district court specifically found that Merrill

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sell any or all of the commodities or contracts in an account whenever in its discretion it considers it necessary and to hold the investor liable for any deficiency remaining in the account in the event of liquidation.

[4] Appellant's characterization of Count II is disputed by Merrill Lynch. Merrill Lynch argues that Count II did not, as alleged by appellant, allege that Palmen intentionally submitted a false financial statement on appellant in violation of the Commodities Exchange Act, 7 U.S.C. §6b. Count I alleged that Merrill Lynch, through Stephen Palmen, defrauded appellant by misrepresenting the soundness of the peso as an investment in violation of the Commodities Exchange Act, 7 U.S.C. §6b, o. Count II adopted all of Count I and further alleged that Merrill Lynch, through Stephen Palmen, defrauded appellant by "wrongfully" attempting to enlist appellant in the Guided Investment Program in violation of exchange rules, Merrill Lynch's house rules and good brokerage practice. Count III adopted all of Counts I and II and further alleged that Merrill Lynch breached its duty to adequately review and supervise appellant's account. Appellant specifically asserted that Palmen was the source of the false and inaccurate financial and personal information on the New Account Information form (Exhibit No. 1). Count IV adopted all of Counts I, II and III and further alleged that Merrill Lynch had inside information about the devaluation of the peso which it selectively disclosed in reckless disregard of appellant's financial welfare. Appellant was unable to establish either that Merrill Lynch knew in advance of the devaluation or had disclosed such information to selected customers. "For all practical purposes, Count IV is not involved in this appeal." Brief of Appellant at 8.

[5] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, No. 76-852C(1)(E.D. Mo., Dec. 29, 1977) (order granting plaintiff's motion to dismiss Counts II, III and IV of defendant's second amended counterclaim).

Lynch had committed no fraud, no misrepresentation and no violation of the Commodities Exchange Act.

Apppellant first argues that the district court erred in making certain findings of fact and conclusions of law. Appellant specifically challenges the findings that (1) appellant was a "knowledgeable investor," (2) Merrill Lynch extended the margin trading limits of appellant's account to $50,000, (3) appellant prepared the New Account Information form and supplied erroneous financial information to broker Palmen and Merrill Lynch, (4) Palmen made no representations to appellant concerning the safety and stability of the peso as an investment, and (5) Merrill Lynch committed no violation of the *Securities* Exchange Act.

These allegations of error as well as the record indicate that the present case involved many disputed issues of fact. Because this case was tried by the district court, sitting without a jury, our review is somewhat limited. *Fed. Rules Civ. Proc.* 52(a). The findings of the trial court will not be set aside unless clearly erroneous and unsupported by substantial evidence or, if supported by substantial evidence, we are satisfied that a mistake has been made. *E.g., Birdwell v. Hazelwood School Dist.*, 491 F.2d 490, 494 (8th Cir. 1974). In particular we note that "it is not the function of an appellate court to try the case *de novo*, or to pass upon the credibility of witnesses or the weight to be given their testimony. . . ." *Shull v. Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 155 (8th Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). This is especially true where the case is primarily based upon oral testimony and where the trial judge has had an opportunity to view the demeanor and credibility of the witnesses. *E.g., Snodgrass v. Nelson*, 503 F.2d 94, 96 (8th Cir. 1974).

After a careful review of the evidence, we are unable to agree with appellant. We cannot say that three of the challenged findings of the trial court are clearly erroneous: (1) that

appellant was a "knowledgeable investor," (2) that appellant prepared the New Account Information form and supplied erroneous financial information to broker Palmen and Merrill Lynch, and (3) that Palmen made no representations to appellant about the safety of the peso as an investment. There was evidence that appellant was aware of the circumstances that made the peso more profitable and more speculative an investment and that appellant had already invested a substantial amount in certificates of deposit in Mexican banks. There was also evidence that appellant completed the New Account Information form as part of the forms every new commodities customer is required to complete and that this information was used by the clerical staff of Merrill Lynch in typing the form itself. We also note, without any evaluation of its accuracy, that a credit service report prepared at the request of Merrill Lynch contained information roughly similar to that reported on the form. This finding and the finding about the lack of representations made to appellant are particularly dependent upon the district court's evaluation of the credibility of the witnesses. The parties presented directly contradictory evidence on each of these factual issues. With this observation in mind, we note that the evidence showed appellant approached Palmen with an interest in peso futures (developed from reading unsolicited investment newsletters), appellant discussed the peso with Palmen, Palmen then telephoned Merrill Lynch's foreign currency specialists in Chicago, the specialists noted the peso market was erratic and speculative and expressed "no opinion," and the next day appellant placed his first order to purchase peso futures contracts. Of the two findings that are erroneous, the limit of appellant's margin and the reference to the *Securities* Exchange Act instead of the *Commodities* Exchange Act, neither error in our opinion prejudiced appellant's case.[6]

[6] Appellant accurately challenged the validity of the district court's finding that Merrill Lynch raised the margin trading limit of appellant's account to $50,000. The record indicates that Merrill Lynch at no time raised appellant's trading limit. Merrill Lynch concedes this in its brief. Brief of Appellee at 34. We do not find this error was prejudicial. Count II of appellant's counterclaim alleged a failure on the part of Merrill Lynch to "know your customer" and thus a failure to place appropriate limits on appellant's account. It does appear from the evidence that at one point appellant's account exceeded its margin trading limit by about $7,000. Even assuming, however, that appellant sought to allege a violation of the margin maintenance rules, such a failure in the absence of fraud would not constitute a basis for the imposition of liability upon the broker. *Cf. Carras v. Burns*, 516 F.2d 251 (4th Cir. 1975) (Securities Exchange Act). In *Carras v. Burns* the executors of an estate sued a stockbrokerage firm and two of its employees for losses sustained by the estate's margined securities account, allegedly as a result of the firm's failure to make timely margin calls to maintain the estate's equity. Such a failure violated the stock exchange rules. The court, however, declined to recognize a private cause of action for the breach of the rules alone and in the absence of fraud. *Id.* at 260. The court noted the margin rules had been promulgated primarily to protect the solvency of *brokers* by requiring adequate collateral to finance margin trading by their customers. *Id.* Further, the court observed that violation of the margin rules would perhaps subject the broker to discipline by the exchange but not to liability for loss unless the breach of rules also violated the securities act by operating as a fraud. *Id.*

The other error was the district court's reference to the *Securities* Exchange Act in its second conclusion of law. In our opinion this reference can be characterized as a clerical error and does not indicate the district court misunderstood the nature of appellant's defenses or counterclaims.

Secondly, appellant argues the district court erred in not finding that Palmen submitted the false financial statements to his superiors at Merrill Lynch in violation of the antifraud provisions of the Commodities Exchange Act, 7 U.S.C. § 6b. The information on the form indicated appellant had $500,000 in stocks and commodities, his annual income was approximately $50,000, his estimated net worth was $2 million, and his available risk capital for commodities trading was $100,000. Appellant's actual financial position was considerably below these figures. Appellant argues that Palmen was responsible for supplying the false information and that Palmen, and ultimately Merrill Lynch, was in fact engaged in a scheme to attempt to defraud appellant. Appellant contends the false financial infor-

mation was just one part of this fraudulent scheme intended to involve appellant in an ambitious investing program for which he was unqualified. The district court expressly found that appellant himself supplied this false information. As was true of the other challenged conclusions of the district court, this finding was based to a large extent upon the district court's evaluation of the credibility of the witnesses, to which we defer. We are unable to say the finding of the district court was clearly erroneous.[7]

Finally, appellant argues that the district court erred in dismissing Count III of appellant's counterclaim which alleged Merrill Lynch failed to supervise appellant's account and Palmen's handling of the account, failed to "know your customer" and failed to review appellant's suitability and qualifications as a commodities investor. Appellant argues Merrill Lynch in so doing violated its house rules,[8] stock exchange rules,[9] dealer

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[7] Further, in our opinion, appellant's statutory fraud issue was raised in Count I of the amended counterclaim even though, as appellant argues in his reply brief, it was more explicitly set forth in Count II. In any event, the allegation of statutory fraud was given adequate consideration by the district court and ultimately rejected. The district court memorandum reveals that Count II was dismissed as repetitive of Counts I and III and not for the reason that the district court failed to recognize a private cause of action for violations of the Commodities Exchange Act. Such actions are well recognized. *See Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8 (7th Cir. 1977); *Deaktor v. L. D. Schreiber & Co.*, 479 F.2d 529, 534 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973) (citation of cases); *Booth v. Peavey Company Commodity Services*, 430 F.2d 132, 133 (8th Cir. 1970).

[8] Merrill Lynch's house rule 09.12 provides in part:

> As a basic policy, the Corporation [Merrill Lynch] does not wish to handle speculative commodity business for individuals who cannot afford the risks, and for those who are temperamentally not suited to commodity trading. Those who are not willing to take the time to learn what they are doing should be discouraged from trading.

association rules,[10] and good brokerage practice. Appellant argues these violations give rise to a private cause of action. Under the facts of the present case, we must disagree with appellant.

> . . . We do not wish to handle speculative commodity business for individuals with small net worth or small annual income. Neither do we wish to handle business for those individuals regardless of net worth or income whose losses would be detrimental to their general standard of living nor for those whose family responsibilities are such that any loss of capital would impair the financial security of the individual and his dependents.

[9] New York Stock Exchange Rule 405 is popularly known as the "know your customer" rule. It provides in part:

> Every member organization is required through a general partner, a principal executive officer or a person or persons designated under the provisions of Rule 342(b)(1) to
>
> (1) Use due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization and every person holding power of attorney over any account accepted or carried by such organization.
>
> (2) Supervise diligently all accounts handled by registered representatives of the organization.
>
> (3) Specifically approve the opening of an account prior to or promptly after the completion of any transaction for the account of or with a customer, provided, however, that in the case of branch offices, the opening of an account for a customer may be approved by the manager of such branch office but the action of such branch office manager shall within a reasonable time be approved by a general partner, a principal. . . .

[10] National Association of Security Dealers Rule 27 provides in part:

> (a) Each member shall establish, maintain and enforce written procedures which will enable it to supervise properly the activities of each registered representative and associated person to assure compliance with applicable securities laws, rules, regulations and statements of policy promulgated thereunder with the rules of this Association.
>
> . . .
>
> (d) Each member shall review the activities of each office, which shall include the periodic examination of customer accounts to detect and prevent irregularities or abuses and at

We note initially that none of the cases cited by appellant have recognized a private cause of action for alleged violations of a broker's house rules. The question whether a violation of a private stock exchange or trade association rule, required to be promulgated by federal law, such as a rule of the New York Stock Exchange or the National Association of Security Dealers, gives rise to a private cause of action in favor of a customer damaged as a result of the violation is a "troublesome one." *Shull v. Dain, Kalman & Quail, Inc., supra,* 561 F.2d at 160. Most of the cases have answered the question affirmatively *but* with some reservations. *See Avern Trust v. Clarke,* 415 F.2d 1238, 1242 (7th Cir. 1969); *Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 410 F.2d 135, 142 (7th Cir.), *cert. denied,* 396 U.S. 838 (1969); *Evans v. Kerbs & Co.,* 411 F. Supp. 616, 624 (S.D.N.Y. 1976); *cf. Colonial Realty Corp. v. Bache & Co.,* 358 F.2d 178, 181-83 (2d Cir.), *cert. denied,* 385 U.S. 817 (1966) (sets forth test under which to evaluate whether to imply private cause of action from federal regulatory statutes); *see generally* Lowenfels, *Implied Liabilities Based Upon Stock Exchange Rules,* 66 *Colum. L. Rev.* 12 (1966); Note, *Private Rights of Action for Commodity Futures Investors,* 55 *B.U. L. Rev.* 804 (1974). In particular, the courts have typically found no private right of action exists for violation of exchange or dealer association rules in the absence of a

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least an annual inspection of each office and supervisory jurisdiction.

The National Association of Security Dealers Rules of Fair Practice, Article III, § 2, *CCH NASD Manual ¶ 2152, Art. III, § 2,* provides:

> In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

This rule is also referred to as the "know your customer" or suitability rule. *E.g., Architectural League v. Bartos,* 404 F. Supp. 304, 314 (S.D.N.Y. 1975).

finding of fraud. *See, e.g., Shull v. Dain, Kalman & Quail, Inc., supra,* 561 F.2d at 160; *Lincoln Commodity Services v. Meade,* 558 F.2d 469, 474 n.1 (8th Cir. 1977); *Carras v. Burns, supra,* 516 F.2d at 260; *Evans v. Kerbs & Co., supra,* 411 F. Supp at 624; *Architectural League v. Bartos, supra,* 404 F. Supp. at 314.

In the present case the district court should not have dismissed Count III because appellant did state a private cause of action by alleging violations of exchange and dealer association rules accompanied by allegations of fraud. *See Evans v. Kerbs & Co., supra,* 411 F. Supp. at 624 (cases cited therein). As noted above, however, the district court permissibly found that appellant failed to prove fraud on the part of Merrill Lynch. Even if Merrill Lynch had been found to have violated the exchange and/or dealer association rules, such a violation, in the absence of facts establishing fraud, would not constitute an independent basis for liability. *See, e.g., Lincoln Commodity Services v. Meade, supra,* 558 F.2d at 474 n.1. Therefore, we conclude in this case that the district court committed no reversible error in dismissing Count III.

The judgment of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

United States Court of Appeals
For the Eighth Circuit

No. 78-1622

United States, ex rel. Sam Goldman,
Petitioner-Appellant,
v.
The Honorable James H. Meredith, Chief Judge,
The Honorable John F. Nangle, Judge,
W. H. Blumenthal, Secretary of the Treasury,
Respondents,
Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Appellee.

Petition for Writ of Mandamus and/or Prohibition and Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 17, 1978
Filed: April 24, 1979

Before STEPHENSON and McMILLIAN, Circuit Judges, and ROBINSON,* Senior District Judge.

McMILLIAN, Circuit Judge.

* The Honorable Richard E. Robinson, United States Senior District Judge for the District of Nebraska, sitting by designation.

This case concerns the validity of several orders entered by the district court[1] in supplementary post-judgment proceedings to enforce its judgment. It also raises a question that appears to be one of first impression, that is, whether book-entry Treasury bills are subject to garnishment proceedings.

In the underlying litigation appellee, Merrill Lynch, Pierce, Fenner & Smith, Inc. (hereinafter Merrill Lynch), sued appellant, Sam Goldman (hereinafter petitioner), to recover a deficiency of $119,145.00 in petitioner's commodities margin trading account. After a bench trial, judgment was entered in favor of Merrill Lynch for the amount of the deficiency plus interest and costs.[2] Petitioner filed a notice of appeal but did not post a supersedeas bond. Therefore, Merrill Lynch proceeded to execute upon petitioner's property to satisfy its judgment; however, the execution was returned unsatisfied.

Merrill Lynch then instituted supplementary post-judgment proceedings[3] which included the submission of written interrogatories and a judgment debtor examination. These proceedings disclosed that petitioner's property consisted of two apartment buildings in Clayton, Missouri, substantial savings and checking accounts at local banks, and some U.S. Treasury bills. Petitioner further revealed that he had disposed of most of this property[4] in January and February of 1978, before the trial,

[1] The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri (orders of July 31 and August 25, 1978); the Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri (order of August 18, 1978).

[2] The judgment was recently affirmed by this court. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, No. 78-1427 (8th Cir. Mar. 14, 1979), *aff'g* 451 F. Supp. 223 (E.D. Mo. 1978).

[3] F. R. Civ. Pro. 69(a); V.A.M.R. 90.02 *et seq.*

[4] Petitioner gave one of his two apartment buildings to a woman friend and sold the other building in February of 1978. Petitioner does have several hundred dollars in local bank deposits which could be reached by execution.

and had used the proceeds to purchase book-entry Treasury bills. Petitioner invested approximately $205,000 in book-entry Treasury bills.

In light of this information, Merrill Lynch attempted to register the judgment in the United States District Court for the District of Columbia,[5] pursuant to 28 U.S.C. § 1963.[6] The clerk of the court refused to register the judgment because it was not "final by appeal." *See Abegglen v. Burnham*, 94 F. Supp. 484, 486 (D. Utah 1950) (holding a judgment of a district court does not become "final by appeal" within the meaning of the statute providing for registration of such judgments in another district until the case has been disposed of by appeal); *accord, Stanford v. Utley*, 341 F.2d 265 (8th Cir. 1965); *Lipton v. Schmertz*, 68 F.R.D. 249 (S.D.N.Y. 1974).

Merrill Lynch next caused a writ of garnishment to be issued to the Federal Reserve Bank in St. Louis, Missouri. It was returned unsatisfied for the reason that the Federal Reserve Bank held neither petitioner's book-entry Treasury bills account nor any evidence of indebtedness belonging to petitioner. Confronted with the prospect that petitioner's assets could not be reached through garnishment proceedings, Merrill Lynch sought equitable relief in the district court on July 12, 1978, by filing an application for a temporary restraining order, a preliminary injunction and a mandatory injunction. On the same day, the district court issued its order to show cause and

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[5] Petitioner's book-entry Treasury bills are held in an account maintained by the Treasury in Washington, D.C. *See* 31 C.F.R. § 350.7(a) (1978).

[6] 28 U.S.C. § 1963 provides in part (emphasis added):

> A judgment in an action for the recovery of money or property now or hereafter entered in any district court *which has become final by appeal or by expiration of time for appeal* may be registered in any other district by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

a temporary restraining order prohibiting petitioner from transferring or cashing out his interest in the book-entry Treasury bills to the extent of $131,655.22 (judgment plus interest and costs at that date). A preliminary hearing was set for July 21, 1978.

After the preliminary hearing at which the parties stipulated to most of the facts at issue, the district court entered its order on July 31, 1978, granting a preliminary injunction and further ordering petitioner to cash sufficient book-entry Treasury bills to satisfy the outstanding judgment. The latter part of the order was stayed pending disposition of the appeal.

Prior to the issuance of the preliminary and mandatory injunctions, Merrill Lynch had caused a writ of execution and summons to be issued to the Department of the Treasury (hereinafter the Treasury) on July 18, 1978. The answer of the Treasury disclosed that, as of the date of service, it held two book-entry Treasury bills in petitioner's account (total value of $170,000) and had marked the account so petitioner could not withdraw them without prior authorization. The answer further stated that because book-entry Treasury bills were not represented by a definitive security in the form of an engraved certificate, the bills would have to be transferred through the Federal Reserve Bank communication system into a book-entry account maintained by or through a member bank in the Federal Reserve System before they could be subject to execution and sale.

Thereafter, on August 18, 1978, the district court ordered the U.S. Marshal to seize petitioner's book-entry Treasury bills, to transfer them through the Federal Reserve Bank System, and to sell them in satisfaction of the judgment. On August 25, 1978, the district court further ordered the Treasury bills to be sold through a Federal Reserve Member bank, at the market price, and without prior public notice.

Three days later, on August 28, 1978, petitioner filed a petition for a writ of mandamus or alternatively for a writ of prohibition, challenging the validity of the district court orders and the recognition of such orders by the Treasury. Petitioner sought to have the orders set aside and to have the Treasury prohibited from transferring the book-entry Treasury bills without petitioner's consent.

On September 5, 1978, this court ordered the above orders of the district court stayed pending the appeal and hearing on the petition for mandamus. We further ordered petitioner not to cash, transfer, or in any way alter the status of his book-entry Treasury bills in the amount of $130,000.00 pending the final judgment of the court in this matter.

As a basis for relief petitioner argued that (1) the district court did not have jurisdiction to grant equitable relief, (2) the district court erred in granting the preliminary and permanent injunctions, and (3) the Treasury violated its own regulations by restrictively marking petitioner's book-entry Treasury bills. For the reasons discussed below we are unable to agree with petitioner and therefore deny the petition for writ of mandamus or in the alternative for writ of prohibition.

First, petitioner argues that the district court exceeded its jurisdiction in granting Merrill Lynch injunctive relief. Petitioner argues that Merrill Lynch sought equitable relief in the form of a "creditor's bill" and that such relief is not available under Missouri law. We disagree. F. R. Civ. P. 69(a) provides in part:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

Thus, in the absence of a controlling federal statute, the district court has the same authority to aid judgment creditors in supplementary proceedings as that which is provided to state courts under local law. *E.g., North Pacific Steamship Co. v. Pyramid Bulkcarriers, Inc.*, 515 F.2d 426 (5th Cir. 1975); *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1975); *Nelson v. Maiden*, 402 F. Supp. 1307 (E.D. Tenn. 1975); *Douglass v. First National Realty Corp.*, 351 F. Supp. 1142 (D.D.C. 1972).

Our review of Missouri law persuades us that equitable relief in the form of a creditor's bill is an available creditor's remedy, under the appropriate circumstances. *E.g., Buckley v. Maupin*, 344 Mo. 193, 125 S.W.2d 820 (1939); *O'Connell v. Smith*, 131 S.W.2d 730 (Mo. Ct. App. 1939); *State ex rel. Busby v. Cowan*, 232 Mo. App. 391, 107 S.W.2d 805 (1937); *cf. Haase v. Chapman*, 308 F. Supp. 399 (W.D. Mo. 1969) (appointment of receiver). In general, a creditor's bill is considered the equitable equivalent of garnishment or execution and comparable to proceedings supplementary to and in aid of execution. *See Pierce v. United States*, 255 U.S. 398, 40'-02 (1921); *State ex rel. Busby v. Cowan, supra*, 107 S.W.2d at 807. By the means of a creditor's bill, a judgment creditor seeks to satisfy his judgment from property of the judgment debtor which is not subject to execution. Such relief is thus appropriate only upon a showing by the judgment creditor that he has no adequate legal remedy. *See O'Connell v. Smith, supra*, 131 S.W. 2d at 733. Missouri case law indicates that this type of equitable relief is within the general equitable jurisdiction of Missouri state courts and further that it is a remedy "as comprehensive in scope and purpose as the remedy provided by the statutory enactments in other states." *Geist v. City of St. Louis*, 156 Mo. 643, 57 S.W. 766, 767 (1900).

We also find the cases cited by petitioner, *First National Bank of Boston v. Santisteban*, 285 F.2d 855 (1st Cir. 1961), and *Nelson v. Maiden, supra*, to be distinguishable because in each case the local law did not provide for the type of relief sought in supplementary proceedings for the enforcement of judgments. As noted above, our reading of Missouri law indicates that a creditor's bill is, by judicial construction, one of the available supplementary proceedings in aid of execution in Missouri. We read *State ex rel. Busby v. Cowan* to support our analysis of the availability of a creditor's bill as a judgment creditor's remedy. The court in *State ex rel. Busby v. Cowan* recognized that a creditor's bill was a proper remedy but was forced to reject it in the case before it because a state statute expressly prohibited garnishment proceedings against municipal corporations. 107 S.W.2d at 807. Apart from the Treasury regulations, discussed further below, we are not confronted with a similar prohibition in the present case.

Petitioner next challenges the district court's granting of injunctive relief. He argues that the district court improperly reached the merits of the case by granting the permanent injunction after the preliminary hearing without expressly ordering consolidation and without giving the parties adequate notice. *See* F. R. Civ. Pro. 65(a)(2). Ordinarily, it is improper to dispose of a case on the merits after the preliminary hearing; "[t]here are certain circumstances, however, in which a final adjudication after a hearing on a preliminary injunction is appropriate even without formal consolidation." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2950, p. 490 (1973). For example, disposition on the merits may be appropriate whenever the evidence presented at the preliminary hearing indicates that there is no conflict of material fact that would justify holding the full trial on the merits. *E.g., Bright v. Nunn*, 448 F.2d 245, 247 n.1 (6th Cir. 1971) (determinative facts uncontested); *Hurwitz v. Directors Guild of America, Inc.*, 364 F.2d 67, 70 (2d Cir.), *cert. denied*, 385 U.S. 971

(1966) (no triable issue of fact). *But see Progress Development Corp. v. Mitchell*, 286 F.2d 222, 234 (7th Cir. 1961) (absence of material fact issue at preliminary hearing does not justify reaching the merits); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2950, p. 492 (1973).

We do not find the *de facto* consolidation of the preliminary hearing and the trial on the merits to have been improper in the present case. We note that most of the facts were stipulated by the parties. The only disputed question, whether the book-entry Treasury bills purchased by petitioner were subject to garnishment, is one of law and remains contested at this proceeding. Moreover, petitioner continues to urge that the book-entry Treasury bills are not subject to garnishment, a position which can only support the conclusion of the district court that Merrill Lynch had no adequate remedy at law. In our view there was no conflict of material fact which justified the holding of a full trial on the merits. We note, however, that it is certainly preferable to expressly order consolidation after giving adequate notice to the parties. *See, e.g., Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972).

Petitioner also argues that the district court erred in granting injunctive relief because Merrill Lynch failed to establish a reasonable probability of irreparable injury or a substantial probability of success on the merits. Petitioner argues again that this type of equitable relief is not an available form of supplementary relief in Missouri. As discussed above, our reading of Missouri case law is to the contrary. Petitioner further argues that Merrill Lynch failed to show a reasonable probability of irreparable injury because there was no evidence petitioner had made any fraudulent conveyances, threatened to free the jurisdiction, made himself insolvent or committed any other action to defraud his creditors. Missouri case law indicates, however, that the return of a writ of execution unsatisfied has

been held to establish prima facie, if not conclusively, that the judgment creditor has exhaused his legal remedies and may maintain an action for equitable relief. *E.g., Steele v. Reid*, 284 Mo. 269, 223 S.W. 881 (1920); *O'Connell v. Smith, supra*, 131 S.W.2d 730.

We note that Merrill Lynch argues that the issue of the propriety of injunctive relief is moot and should be dismissed because, subsequent to the order of July 31, 1978, the Treasury affirmatively responded to the writ of execution issued by the district court[7] and restrictively marked petitioner's book-entry account. Therefore, Merrill Lynch argues that the book-entry Treasury bills may be reached by writ of execution and no equitable relief is necessary. This argument raises petitioner's final point: whether the Treasury acted in violation of its own regulations by accepting the writ of execution and restrictively marking petitioner's book-entry account. Petitioner argues the action of the Treasury violated 31 C.F.R. § 350.16(b), which provides: "The Treasury will not under any conditions accept notices of pending judicial proceedings, or of judgments in favor of creditors or others, or of any claims whatsoever, for the purpose of suspending or modifying any book-entry account or any transaction in book-entry Treasury bills." It is petitioner's position that this regulation, in effect, shields book-entry accounts from judicial process. We cannot accept this position.

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[7] Although the Treasury has evidently waived any objection to the issuance of process in the present case and has consented to follow the orders of the district court and this court in this matter, *see* Brief of Respondent W. H. Blumenthal, Secretary of the Treasury, at 7, we raise a question about the validity of such process. In our opinion, the district court sitting in Missouri, did not have the jurisdiction to issue a writ of execution in favor of a private party to the Treasury in Washington, D.C. *See* F. R. Civ. Pro. 4(f); V.A.M.R. 76.06; *Globe Indemnity Co. v. Roe*, 37 F. Supp. 761, 762 (S.D.N.Y. 1941); 12 C. Wright & A. Miller, Federal Practice and Procedure § 3013, p. 70 (1973); *compare* 28 U.S.C. § 2413 (executions in favor of the United States may be executed anywhere in the United States).

In the absence of an express directive, we will not create a sanctuary for judgment debtors. We do not read 31 C.F.R. § 350.16(b) to insulate petitioner's book-entry account from judicial process. In our opinion, 31 C.F.R. § 350.16(b) must be read with the general regulations governing United States securities, especially those regulations concerning transfer of United States securities through judicial proceedings. *See* 31 C.F.R. §§ 306.0, 306.100, 306.101. These regulations provide that "[t]he Treasury will recognize valid judicial proceedings affecting the ownership of or interest in transferable securities, upon presentation of the securities together with evidence of the proceedings." 31 C.F.R. § 306.100. The evidence necessary is described in 31 C.F.R. § 306.101: "copies of a final[8] judgment, decree, or order of court and of any necessary supplementary proceedings must be submitted." These regulations demonstrate that the Treasury will recognize judicial process, given the appropriate evidence.

Frankly, we are somewhat perplexed by the language used in 31 C.F.R. § 350.16(b). At first glance, this regulation does appear to provide petitioner with his sought-after sanctuary. We believe, however, it is wiser to construe this regulation so as to effect an accommodation with the general regulations discussed above. We read 31 C.F.R. § 350.16(b) to prohibit the Treasury only from accepting *notices* of pending judicial proceedings, *notices* of judgments in favor of creditors or others, or *notices* of any claim.[9] By this construction, we believe the

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[8] Presumably "final judgment" here refers to "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," *Catlin v. United States*, 324 U.S. 229, 233 (1945), and not final by appeal or by expiration of time for appeal.

[9] Petitioner argues that under Missouri practice and procedure a "notice of garnishment" is necessary to confer jurisdiction over the property garnished, *see Meyer v. Meyer*, 571 S.W.2d 477 (Mo.App. 1978); *Fulkerson v. Laird*, 421 S.W.2d 523 (Mo. App. 1967), and therefore falls within the prohibition in 31 C.F.R. § 350.16(b)

Treasury can, without violating 31 C.F.R. § 350.16(b), recognize valid judicial proceedings, specifically writs of execution. We also read the regulations to permit the Treasury to recognize evidence of valid judicial proceedings other than writs of execution, that is, final judgments, decrees or orders of court and any necessary supplementary proceedings authenticated and certified under court seal. *See* 31 C.F.R. § 306.101. We do not believe, however, that the Treasury should recognize letters or other communications unsupported by authenticated copies of final judgments or supplementary proceedings.

Ordinarily, supplementary proceedings in aid of execution would not present such difficulties. We believe, however, that the unique character of this new form of government security deserves further discussion. Book-entry Treasury bills are issued in the form of an entry on the records of a Federal Reserve bank or the Treasury; there is no engraved certificate or other tangible evidence, only the account entry itself. A depositor receives only confirmation (in the form of an "advice") of transactions in his book-entry account. By eliminating securities in the form of engraved certificates, the Treasury sought to protect against losses due to theft, mishandling and counterfeiting; to reduce costs of issuing, storing and delivering securities in physical form; and to ease the burden of paperwork created by the growing volume of public debt transactions. 41 Fed. Reg. (Treasury Department Circular, Public Debt Service 26-76, Dec. 6, 1976). Book-entry Treasury bills in definitive form as engraved certificates were issued for a limited period of time (until December 31, 1978), in denominations of $100,-

against the acceptance of "notices." We think petitioner is reading the unacceptable "notices" referred to in 31 C.F.R. § 350.16(b) too narrowly. In order to accommodate the Treasury's recognition of proper evidence of valid judicial proceedings in 31 C.F.R. § 306.100, we read "notices" to refer to some communication other than any necessary supplementary proceedings, 31 C.F.R. § 306.101, for example, a letter referring to a judgment instead of a certified copy of the judgment.

000, and only to "eligible entities" required by law to hold definitive securities. *See* 31 C.F.R. § 350.17.

It is apparent from the above discussion that book-entry Treasury bills represent a new form of government security that is, by design, intangible. In our opinion, this intangible nature necessitates the injunctive relief granted in the present case, despite the recognition by the Treasury of valid legal proceedings as discussed above. This is because there is simply nothing capable of being physically executed upon and then transferred. In its answer to the interrogatories (Exhibit B), the Treasury indicated the book-entry Treasury bills would first have to be transferred through the Federal Reserve bank communications system into a book-entry account maintained by or through a member bank in the Federal Reserve Bank System and then sold. On the basis of this information, the district court authorized the U.S. Marshal to make a certified request on behalf of petitioner to transfer the book-entry Treasury bills through the Federal Reserve bank communications system and to effect the execution sale in satisfaction of the judgment. In view of the fact that the book-entry Treasury bills at issue are now mature (and overdue), *see* 31 C.F.R. § 306.25(b), petitioner, or, if necessary, the U.S. Marshal, authorized to act on petitioner's behalf, now has only to transfer the book-entry Treasury bills by certified request,[10] redeem them, and apply the proceeds in satisfaction of the judgment.

In sum, we find that (1) equitable relief in the form of a creditor's bill is available, under the appropriate circumstances, to a judgment creditor under Missouri law in supplementary

[10] We are unsure whether a certified request made by or on behalf of the depositor is a prerequisite to transfer the book-entry Treasury bills. If it is not, then we see no difficulty with the Treasury transferring the book-entry Treasury bills, without a certified request by or on behalf of the depositor, upon presentation of certified copies of a final judgment, decree or order and any necessary supplementary proceedings or pursuant to other valid judicial proceedings (i.e., a writ of execution).

proceedings in aid of execution; (2) the Treasury is not prohibited from recognizing valid judicial proceedings affecting ownership of or interest in book-entry Treasury bills upon presentation of the necessary evidence;[11] and (3) even though the

[11] We do not read the regulations to restrict "valid judicial proceedings" to enforcement of the judgment by writ of execution. Treasury will recognize valid judicial proceedings, the unique nature of book-entry Treasury bills and the necessity of transfer through the Federal Reserve bank communications system, by a certified request made by or on behalf of the depositor, makes injunctive relief necessary.

Accordingly, the petition for writ of mandamus or in the alternative for writ of prohibition is denied. Because the book-entry Treasury bills at issue are now mature, and in fact overdue, we remand to the district court with directions to modify its orders and to direct petitioner to make a certified request to transfer his book-entry Treasury bills within 10 days, to redeem them and to apply the proceeds to satisfy the outstanding judgment, or, if petitioner fails to make a certified request to transfer within 10 days, to authorize the U.S. Marshal to do so on petitioner's behalf.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

United States District Court
Eastern District of Missouri
Eastern Division

Merrill Lynch, Pierce, Fenner & Smith, Inc., a Corporation,
Plaintiff,
vs.
Sam Goldman,
Defendant.
No. 76-852 C (1)

ORDER

A memorandum dated this date is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that plaintiff's motion to dismiss Counts II, III, and IV of defendant's second amended counterclaim be and is granted.

IT IS FURTHER ORDERED that Counts II, III, and IV of defendant's second amended counterclaim be and are dismissed.

Dated this 29th day of December, 1977.

/s/ J. H. MEREDITH
United States District Judge

MEMORANDUM

(Filed December 29, 1977)

This matter is before the Court on the motion of plaintiff Merrill Lynch, Pierce, Fenner & Smith, Inc., to dismiss for failure to state a claim upon which relief can be granted. For the following reasons, plaintiff's motion will be sustained.

This litigation arose as the result of losses incurred in the trading of Mexican peso futures contracts. Plaintiff is a registered commodity broker who handled the purchase for defendant. Between May 1976 and July 1976, defendant placed five futures contracts orders with plaintiff. All were consummated by plaintiff on the International Monetary Market of the Chicago Mercantile Exchange. The contracts were agreements to purchase one million pesos on the maturity date for a given price.

On or about August 31, 1976, the Mexican government announced it would no longer support the peso at the fixed parity price of eight cents per peso, and instead decided to allow it to float at market value. As a result, the Mexican peso decreased in value with reference to the dollar and the International Monetary Market subsequently increased margin requirements to $25,000 per contract. On September 2, 1976, plaintiff gave notice to the defendant to deposit $125,000 to meet the new margin requirements. Because the defendant failed to do so, plaintiff sold defendant's five contracts, pursuant to the Commodity Account Agreement. Defendant lost over $119,000 in the exchange. Defendant refused to tender this amount to plaintiff in satisfaction of the loss incurred in the transaction. Accordingly, plaintiff filed its complaint for $119,145.00 on September 21, 1976.

In response thereto, defendant filed a counterclaim in four counts. Plaintiff has responded with a motion to dismiss or strike

Counts II, III, and IV for failure to state a claim upon which relief can be granted, or as irrelevant, immaterial, and prejudicial under Rule 12(f).

Count I of defendant's counterclaim alleges that plaintiff defrauded defendant by misrepresenting the soundness of investing in peso futures and by doing so violated the Commodities Exchange Act, 7 U.S.C. § 6b and 6o. Defendant seeks an award of damages in the sum of $12,000 to cover his loss of his initial investment and further prays for punitive damages.

Count II adopts all of Count I and further states that plaintiff's actions were "wrongful" in that the inducements made by plaintiff were fraudulently made to convince defendant to deal with plaintiff on a larger scale; plaintiff failed to disclose the risk involved; and plaintiff caused excessive credit to be extended to defendant, all of which violated plaintiff's house rules, and the broker/client relationship.

Count III alleges that plaintiff had a duty to review and supervise defendant's account and his credit, but that it breached such duty. Defendant seeks damages for plaintiff's failure to follow its house rules and regulations and failure to use "due diligence" in supervising defendant's account.

Count IV claims that plaintiff had inside information which it disclosed to selected customers in reckless disregard of defendant's welfare.

The Court is of the opinion that Count III should be dismissed because these house regulations are for the sole benefit of Merrill Lynch and do not give rise to a private cause of action. *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178 (2d Cir. 1966). Relevant language therein states:

> ". . . whether the courts are to imply federal civil liability for violation of exchange or dealer association rules by a

member cannot be determined on the simplistic all-or-nothing basis urged by the two parties; rather, the court must look to the nature of the particular rule and its place in the regulatory scheme, with the party urging the implication of a federal liability carrying a considerably heavier burden of persuasion that when the violation is of the statute or an SEC regulation." Id. at 182.

In *Colonial* and related cases, the courts were dealing with purported violations of Rule 405 of the New York Stock Exchange. Count III alleges that plaintiff breached its duty of due diligence as required by Merrill Lynch, Rule 05.32. There is no private right of action afforded by the purported failure of plaintiff to follow its own rules. These rules were not drafted for the benefit of the public, but rather for the protection of dealers. The brokerage firm is concerned primarily with discouraging and eliminating actions by its representatives which might give rise to legal liability. *Colonial*, supra; *Carras v. Burns*, 516 F. 2d 251 (4th Cir. 1975); *Nelson v. Hench*, 428 F.Supp. 411 (D. Minn. 1977).

Count II states as a cause of action that plaintiff's representations were part of a scheme to get defendant to make larger investments and that such representations were wrongful in that plaintiff falsely represented the safety of the peso, failed to advise defendant of the risk of commodities trading, and that excessive credit was extended to defendant causing him to lose his investment. Defendant in paragraph 24 further alleges these actions violated the house rules of plaintiff, wherein he states: "such activities violated its own house rules, . . . as set forth in greater detail in Count III herein."

This count merely repeats and reiterates in different language the allegations of Counts I and III. Paragraph 9 of Count I alleges that plaintiff represented there was no risk to defendant's investment capital and that the peso was a safe investment.

Count III contained the specific allegations of violations of house rules. As stated above, the purported breach of such rules or regulations affords no right of action in this case. In the cases cited by defendant, the rules upon which a party was allowed to sue were, at least, exchange or association rules and not merely internal guidelines. Accordingly, Count II will be dismissed.

Count IV alleges that plaintiff had inside information which it disseminated to selected customers. Defendant claims this disclosure was in reckless disregard of its financial welfare. This count will also be dismissed. A "broker has no duty to relay news of political, economic, weather, or price changes to his principal, absent an express contract to furnish such information." *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 337 F.Supp. 107, 112, (N.D. Ala. 1971), aff'd 453 F.2d 417 (5th Cir. 1972); *Carras v. Burns*, supra. Although *Robinson* appears to revole on negligent failure to furnish information, had the defendant in this cause intended to plead fraud in the fourth count, the count would still be repetitious of Count I. Accordingly, Count IV will be dismissed.

Dated this 29th day of December, 1977.

/s/ J. H. MEREDITH
United States District Judge

United States District Court
Eastern District of Missouri
Eastern Division

Merrill Lynch, Pierce, Fenner & Smith, Inc., a Corporation,
Plaintiff,
v.
Sam Goldman,
Defendant.
No. 76-852 C (1)

JUDGMENT

(Filed May 8, 1978)

Findings of fact and conclusions of law dated this day are hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff, Merrill Lynch, Pierce, Fenner & Smith, Inc., have judgment against the defendant, Sam Goldman, on the complaint in the amount of $119,145.00, plus interest at the rate of six percent per annum from September 9, 1976.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the plaintiff, Merrill Lynch, Pierce, Fenner & Smith, Inc., have judgment against the defendant, Sam Goldman, on the defendant's counterclaim and the defendant's counterclaim is dismissed with prejudice. Costs are assessed against the defendant.

Dated this 8th day of May, 1978.

/s/ JAMES H. MEREDITH
United States District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 8, 1978)

This matter was tried to the Court and the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Merrill Lynch, Pierce, Fenner & Smith, Inc., (Merrill Lynch), is a Delaware corporation, with its principal place of business in New York City, and licensed to do business in the State of Missouri. It is engaged in the business as a securities and commodities broker. Sam Goldman is a citizen of the State of Missouri. The amount in controversy exceeds $10,000. Jurisdiction diversity is alleged in the complaint. The counterclaim jurisdiction is based on the Commodities Exchange Act, 7 U.S.C. § 6b and 6o, the essence of which is that the plaintiff defrauded the defendant.

2. On or about May 4, 1976, defendant Sam Goldman went to the offices of Merrill Lynch in Clayton, Missouri, to inquire about investing in Mexican Peso Futures Contracts. He discussed this matter with Stephen Palmen, an account executive in the office. Mr. Palmen had no information about Mexican pesos and had never traded in Mexican Peso Futures. He so advised Mr. Goldman. Goldman brought with him to the office a copy of "McKeever's Multi-National Investment and Survival Letter" of March 9, 1976, which Palmen had never seen. This "Letter" discussed the large returns that could be made by investing in Mexican Peso Futures Contracts. Goldman left the Letter with Palmen. Palmen stated he would look into the matter.

3. The McKeever Letter listed two telephone numbers for Dick Joynes, president of Futures Investment Company, in Cali-

fornia. In Goldman's presence, on May 4, 1976, Palmen called these two numbers and talked to someone who refused to provide any information concerning investment in the peso, unless Palmen subscribed to their advisory service, which Palmen declined to do.

4. At Goldman's request, Palmen requested an opinion from Merrill Lynch's foreign currency specialists in Chicago. These two specialists of Merrill Lynch were Chuck Dushek and Tully Davia. The specialists' opinion sent to Palmen by teletype was that the Mexican peso market was very erratic and speculative and made no recommendation and had no opinion on whether a client should get in or out of this market. The information was related by Palmen to Goldman by telephone on May 4, 1976.

5. Goldman was a lawyer and had practiced law in the St. Louis area for thirty years. At the time he first came to the office of Merrill Lynch, he had $120,000 invested in Mexican Savings and Loan Association certificates of deposit. This investment was made in 1972 and he had been earning ten or eleven percent interest since that time, which was a higher rate than was available on certificates of deposit in the United States. Goldman was a knowledgeable investor and was fully aware of the risk involved in trading in Mexican Peso Futures Contracts. At the time Goldman first came to the office of Merrill Lynch, the peso was tied to a fixed rate of exchange of twelve and one-half pesos to the dollar, with one peso being worth eight cents.

6. The next day, May 5, 1976, Goldman returned to the office of Merrill Lynch and brought with him the New Account Information for Commodities Speculative Accounts card. Goldman indicated on this form that he had $500,000 in current stocks and commodities and that his net worth with two million dollars. He signed the necessary contracts required by the International Monetary Market of the Chicago Mercantile Exchange, of which Merrill Lynch is a member. He made a deposit of $7,000 with Merrill Lynch, which was later increased to $12,000.

7. The following futures contract orders to purchase pesos were made by Goldman for his account with Merrill Lynch.

Date of Order	No. of Pesos	Contract Price Per Peso	Maturity Date of Contract
5- 6-76	1 million	.06883	Dec. 14, 1976
5-12-76	1 million	.06885	Dec. 14, 1976
6-18-76	1 million	.07675	Sept. 14, 1976
7- 2-76	1 million	.07784	Sept. 14, 1976
8-11-76	1 million	.07765	Dec. 14, 1976

8. Merrill Lynch placed a $50,000 maximum margin requirement on the Goldman account, based on the information provided in the New Account Information form provided by Goldman. The rule of thumb of Merrill Lynch was that a commodities trading account should be no more than ten percent of the customer's net worth figure. The $50,000 limit was a conservative figure, based on the information which Goldman had supplied to Merrill Lynch. At Merrill Lynch's request, a Hopper-Holmes credit check was run on Goldman, which indicated that his net worth was $470,000. This report was dated May 28, 1977.

9. On May 4, 1976, when Goldman first came to the office of Merrill Lynch, Palmen made an effort to interest Goldman in a $50,000 guided investment program. Under Merrill Lynch's guided investment program, the client would deposit $50,000 and the brokerage house would buy and sell various stocks, bonds, and other investments. During the entire time that Goldman did business with Merrill Lynch, Palmen made an effort to sell this program to Goldman. Goldman was not interested in the program, but only in Mexican pesos.

10. In June of 1976, Goldman went to the Clayton Brokerage Company and called on Don Becker, a commodities broker. Goldman advised that he was interested in buying four or five peso futures contracts with the December 1977 maturity date. Becker told Goldman that the margin requirement would be $35,000. Goldman advised Becker that when the peso contracts reached a certain point to call him and he would buy some Mexican Peso Futures Contracts. Becker advised Goldman that futures contracts in pesos was a very risky place to be and that there had been a great deal of talk and rumor of devaluation of the peso.

11. On August 19, 1976, Goldman purchased through Don Becker, a December 1977 Peso Futures Contract. Goldman had previously discussed this matter with Palmen at Merrill Lynch and Palmen recommended he not buy the contract, because of the uncertainty of devaluation of the Mexican peso. Goldman sold the December 1977 Mexican Futures Contract on August 25, 1976, and made a profit of $935.00. During the month of August 1976, Goldman deposited $20,000 with the Clayton Brokerage Company to be used for trading in other commodities futures. He continued to trade with Clayton Brokerage in other futures commodities during the month of September 1976.

12. On May 12, 1976, Palmen obtained a McKeever report, dated May 4, 1976. The McKeever report stated that "rumors of devaluation are louder than ever" and that conservative investors should "stand aside . . . until we see what is going to happen." This report was sent by Palmen to Goldman. On May 21, 1976, Palmen observed an article in the "Wall Street Journal", of that date, which stated that the Mexican economy had serious problems and that American investors were concerned over devaluation of the peso. Palmen sent this article to Goldman. Goldman read the article.

13. On August 22, 1976, Goldman could have sold his Mexican Peso Futures Contracts and realized a profit of $22,-

580. This he did not do. On August 31, 1976, the Government of Mexico announced that the peso would no longer be traded at a fixed rate of exchange with reference to the American dollar, but would be allowed to float free at such rate of exchange as the open market would determine. The Commodities Exchange closed for one week because of this announcement. On September 2, 1976, Merrill Lynch called upon Goldman to deposit an additional $125,000 margin, which he declined to do. Merrill Lynch, on September 8, 1976, pursuant to the Commodities Account Agreement signed by Goldman with them, sold Goldman's Peso Contracts at a loss to Merrill Lynch of $131,145, which Merrill Lynch paid. Deducting the $12,000 deposit which Goldman had with Merrill Lynch, Goldman is indebted to Merrill Lynch in the amount of $119,145, together with interest at the rate of six percent per annum from September 9, 1976.

14. Goldman's testimony of his dealings with Palmen is very different from the facts found by the Court.

Conclusions of Law

1. This Court has jurisdiction by virtue of diversity of citizenship, 28 U.S.C. § 1332, and the Commodities Exchange Act, 7 U.S.C. § 6b and 6o.

2. The outcome of this case is determined to some extent by the credibility of the witnesses. When the Court considers the conduct of Goldman, his prior investment in Mexican pesos, the physical evidence of warnings given by Palmen to Goldman, which he admits receiving, the Court finds the plaintiff committed no fraud, no misrepresentation and no violation of the Securities Exchange Act.

3. Judgment will be rendered for the plaintiff, Merrill Lynch, and against the defendant, Goldman, on the complaint in the sum of $119,145, plus interest in the amount of six percent per

annum from September 9, 1976. Judgment will be rendered against the defendant, Sam Goldman, on his counterclaim and in favor of the plaintiff, Merrill Lynch. The counterclaim will be dismissed with prejudice.

Dated this 8th day of May, 1978.

/s/ JAMES H. MEREDITH
United States District Judge

United States District Court
Eastern District of Missouri
Eastern Division

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Plaintiff,
vs.
Sam Goldman,
Defendant.
No. 76-852 C (1)

ORDER

(Filed July 31, 1978)

A memorandum dated this day is hereby incorporated in and made a part of this order.

IT IS HEREBY ORDERED that the motion of plaintiff for a preliminary injunction be and is granted.

IT IS FURTHER ORDERED that defendant cash treasury bills, notes or obligations owned by him in the sum of $130,-

000.00 to satisfy the judgment, costs and interest against him in this case. This order is hereby stayed pending the disposition of the appeal in this case. Pending the final order of the Court of Appeals, the defendant shall immediately deposit with the clerk of this Court the receipts for treasury bills in the sum of $130,000.00. Pending the final order of the Court of Appeals, the defendant, Sam Goldman, is hereby ORDERED not to cash, transfer or in any way effect the status of treasury bills, notes or obligations owned by him in the sum of $130,-000.00.

Dated this 31st day of July, 1978.

/s/ JAMES H. MEREDITH
United States District Judge

MEMORANDUM

(Filed July 31, 1978)

This matter is before the Court on the motion of plaintiff for a temporary injunction. For the reasons stated below, plaintiff's motion will be granted and an injunction issued.

This cause was earlier tried to the court. Plaintiff sued defendant for losses it incurred in trading futures contracts in his behalf. Defendant counterclaimed for fraud.

On May 8, 1978, the Court entered judgment in plaintiff's favor for $119,145.00 plus interest on its claim against defendant. It further granted judgment to plaintiff on defendant's counterclaim.

On June 6, 1978, defendant filed his notice of appeal. He did not, however, file a supersedeas bond.

"When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay [of proceedings to enforce a judgment] . . ." Rule 62(d), F.R.C.P. If no bond is filed the status quo is not preserved and the judgment creditor may proceed to satisfy the judgment.

Because no bond was filed, plaintiff proceeded to examine the assets of defendant. It was discovered that defendant deeded by gift a valuable parcel of property to a girlfriend. Plaintiff also discovered that defendant withdrew most of his money in his savings accounts and purchased four book entry treasury bills in lots of $120,000, $50,000, $25,000 and $10,000.

Plaintiff then tried to register its judgment in the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1963. The clerk, however, refused to accept and register it stating that it was not "final" within the meaning of Section 1963. *Abegglen v. Burnham*, 94 F. Supp. 484 (C.D. Utah 1950).

The plaintiff then issued a writ of garnishment to the Federal Reserve Bank of St. Louis. The bank, through its attorneys, stated that book entry treasury bills cannot be garnished or otherwise reached because the bank neither holds such treasury bills nor any evidence of indebtedness of the United States Government.

Plaintiff next alleges that 31 C.F.R. § 350.16 states that the U. S. Treasury will not honor or comply with a garnishment or other court order concerning the ownership or transfer of ownership of a book entry treasury bill. To effect a transfer the depository owner must make a certified request.

Defendant has no other known assets. Because plaintiff has been unable to satisfy its judgment and because defendant has illustrated a willful desire to avoid satisfaction of the judgment

by not filing a supersedeas bond, by deeding by gift a valuable parcel of land, and by purchasing treasury bills which cannot be attached, the Court will grant plaintiff's motion. Defendant will not be allowed to avoid the plaintiff's right to satisfy its judgment.

Rule 65 provides that a temporary injunction may be issued when there is a reasonable likelihood of success upon the merits, lack of adequate remedy at law, the prospect of irrepairable harm and a less significant hardship on the party enjoined. *Banks v. Trainor*, 525 F. 2d 837, 841 (7th Cir. 1975). No one factor is determinative and the District Court is given discretion to fashion suitable temporary relief. Id.

It is clear that plaintiff has exhausted his legal remedies. It is further clear that plaintiff could suffer irrepairable harm. Defendant has refused to file a supersedeas bond and has converted or given away his assets in attempt to prevent execution.

Finally, there will be little hardship to defendant if ordered to not cash or transfer the bills. Therefore, since plaintiff is without an adequate legal remedy, equitable relief is appropriate. *Ball v. Peper Cotton Press Co.*, 121 S.W. 798 (Mo. App. St. Louis 1909). The Court will order defendant not to cash or transfer his ownership in the bills. Plaintiff has already posted bond in the amount of $10,000.00, which is sufficient. The Court will order defendant to cash the bills and pay the proceeds over to plaintiff in an amount sufficient to satisfy the judgment. This order will be stayed pending appeal. Pending the final judgment of the Court of Appeals, the defendant will be ordered to deposit his receipts for the treasury bills with the clerk of this court in an amount sufficient to pay the judgment, interest and costs, i.e., $130,000.00.

Dated this 31st day of July, 1978.

/s/ JAMES H. MEREDITH
United States District Judge

APPENDIX D

United States Court of Appeals
For the Eighth Circuit

No. 78-1427. September Term, 1978

Merrill Lynch, Pierce, Fenner & Smith, Inc., etc., Appellee, vs. Sam Goldman, Appellant.	Appeal from the United States District Court for the Eastern District of Missouri.

Petitions of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and they are hereby, denied.

April 5, 1979

United States Court of Appeals
For the Eighth Circuit

No. 78-1622. September Term, 1978

United States, ex rel., Sam Goldman, Petitioner/Appellant, vs. Hon. James H. Meredith, etc., et al., Respondents/Appellees.	Appeal from the United States District Court for the Eastern District of Missouri and Petition for Writ of Mandamus and/or Prohibition

Petition of appellant/petitioner for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

May 9, 1979

United States Court of Appeals
For the Eighth Circuit

No. 78-1622. September Term, 1978

United States, ex rel. Sam Goldman, Petitioner-Appellant,

vs.

The Honorable James H. Meredith, Chief Judge,

The Honorable John F. Nangle, Judge,

W. H. Blumenthal, Secretary of the Treasury,

Respondents.

Merrill Lynch, Pierce, Fenner & Smith, Inc.,

Appellee.

Petition for Writ of Mandamus and/or Prohibition and Appeal from the United States District Court for the Eastern District of Missouri.

On motion of Appellant, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 9, 1979

APPENDIX E

EXHIBIT 1

Printed in U.S.A.

NEW ACCOUNT INFORMATION
FOR COMMODITY SPECULATIVE ACCOUNTS

STENCIL HERE MAY 24 1976

FOR NEW ACCOUNTS DEPARTMENT ONLY		
Word	Check Off Necessary Papers	Follow Ing Up
	CODE 86	
	CODE 94	
	CODE 688	
	CODE 117	
	CHARTER	
	EMPLOYER LTR	
N/A (Date Stamp)	MAY 21 1976	
N/A	N/A CLERK STAMP	

Cmdy Acct. No. 685-35369
Date Cmdy Acct. Opened 5/4/76
Business Phone 314-727-0800
Residence Phone Same as above
Taxpayer Ident. No. 490-444-295
Soc. Sec.-Corp. Ident.
Passbook
Alien Reg. No.

MR SAM GOLDMAN
6632 SAN BONITA
CLAYTON MO 63105

NEW CLIENT: Yes [X] No [ ] Married [X] Single [ ] No. of Dependents 0
IS CLIENT OVER 21 YEARS OF AGE: Yes [X] No [ ]
HOW LONG HAVE YOU KNOWN CLIENT two months
OF WHAT COUNTRY IS CLIENT A CITIZEN U.S.A.
SOURCE OF ACCOUNT: Direct Mail Lead [ ] Advertising Lead [ ] Forum Lead [ ] Personal Call [X] Other

BUSINESS STRUCTURE (If Applicable)
SOLE PROPRIETORSHIP [X]
PARTNERSHIP [ ]
CORPORATION [ ]

Full Name Mr. Sam Goldman
IF CLIENT IS MARRIED, SHOW SPOUSE'S EMPLOYER AND OCCUPATION UNDER "OTHER COMMENTS" BELOW
Mailing Address 6632 San Bonita (STREET) Clayton, (CITY) Missouri (STATE) 63105 (ZIP CODE)
Home Address SAME (IF SAME AS MAILING ADDRESS, WRITE SAME)
Employed By Self Address Home address
Nature of Business Manufacturers Rep. Position Held Owner
Has Client Ever Done Business With Another Broker Yes [ ] No [X]
Name of Broker
Current Stock And Commodity Equity At Other Broker $ 500,000
Has Client Done Commodity Business With Another MLPF&S Office Yes [ ] No [X]
Office At PREVIOUS CMDY ACCT NO
If Power of Attorney In Whose Favor (FULL NAME AND CMDY ACCT NO IF ANY) Relationship To Customer Friend
Related Cmdy. Accts. (If None – State None) None And Other Comments
Bank Reference And Branch Location 10/62 Low 4 bal 926-3566 5/3/76 OK aaaa Clayton Bank - Clayton, Missouri St. Louis County National

SIGNATURE OF ACCOUNT EXECUTIVE OPENING ACCOUNT 8189

TO BE COMPLETED ON ALL SPECULATIVE ACCOUNTS BY OFFICE MANAGER EVERY QUESTION MUST BE ANSWERED

Is Client Experienced in Futures Speculation Yes Estimate of Customer's ANNUAL INCOME $ 50,000
Estimated NET WORTH (Exclusive of Equity in Home) $ 2,000,000
Current Equity in Client's Merrill Lynch Security Accts. $ and M.L. Cmdy. Accts. $ 7,000
Client's Merrill Lynch Security Account Numbers
Estimated Risk Capital Available For Commodity Trading $ 100,000 How Did You Determine Customer's Estimated Financial Position Asked
Suggested DOLLAR TRADING LIMIT (Maximum Margin Requirements At Any One Time) Based On Your Estimate Of Client's Financial Situation and Temperament $ ~~30,000~~ 25,000 (Subject to Periodic Review) How You Advised A/E Accordingly
Are You Satisfied That This Customer is a Desirable Speculative Commodity Account Yes
Has Anyone Discussed Risk of Commodity Trading With Customer Yes If So, Who

5/14/76 DATE — APPROVED (Office Manager) — REVIEWED BY (Commodity Division) — ACCEPTED BY (Commodity Division)

Supreme Court, U. S.
FILED
JUL 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1842

SAM GOLDMAN,
Petitioner,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., THE HONORABLE JAMES H. MEREDITH, CHIEF JUDGE, THE HONORABLE JOHN J. NANGLE, JUDGE, and W. H. BLUMENTHAL, SECRETARY OF THE TREASURY,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

For Merrill Lynch, Pierce, Fenner & Smith, Inc.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1842

SAM GOLDMAN,
Petitioner,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., THE HONORABLE JAMES H. MEREDITH, CHIEF JUDGE, THE HONORABLE JOHN J. NANGLE, JUDGE, and W. H. BLUMENTHAL, SECRETARY OF THE TREASURY,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

For Merrill Lynch, Pierce, Fenner & Smith, Inc.

OPINIONS BELOW

The opinions delivered in the courts below are as stated by petitioner and are appended to the petition for Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdictional statement as set forth in the petition.

QUESTIONS PRESENTED

Petitioner misstates the nature of the legal issue or issues sought to be reviewed. These issues are:

I. Is it a departure from accepted judicial standards of review for the Court of Appeals to deny an appellant a new trial on an erroneously dismissed cause of action when the evidence below shows that the petitioner would not be entitled to recover upon any theory because petitioner was unable to show that he was defrauded?

II. Is it a departure from accepted standards of review for the Court of Appeals after careful review of the evidence below, to determine that the District Court considered all evidence presented by petitioner on each of petitioners' theories of recovery and permissably found that respondent Merrill Lynch committed no violation of the Commodities Exchange Act?

III. Is it a departure from accepted judicial standards of review for the Court of Appeals to determine that the District Court findings of fact, which were based to a large extent upon the credibility of the witnesses, were not clearly erroneous and that any error was not prejudicial?

IV. Does the violation of a broker's own house rules create a private cause of action in a customer with respect to a commodity transaction?

V. Does 31 CFR 350.16 (b) create a haven for judgment debtors?

VI. If 31 CFR 350.16 (b) is construed to protect Goldman's Treasury Bills from execution and garnishment, is said regulation unconstitutional in that it violates the provisions of the Fifth Amendment to the Constitution of the U. S. in that it deprives Merrill Lynch of its property right without due process of law?

STATUTES AND REGULATIONS INVOLVED

In addition to the Statutes and Regulations Involved cited by petitioner, the following regulations are also involved: 31 CFR, Section 306.100, which read as follows:

§ 306.100 **Transferable securities.**

The Department will recognize valid judicial proceedings affecting the ownership of or interest in transferable securities, upon presentation of the securities together with evidence of the proceedings. In the case of securities registered in the names of two or more persons, the extent of their respective interests in the securities must be determined by the court in proceedings to which they are parties or must otherwise be validly established.

31 CFR, Section 306.101:

§ 306.101 **Evidence required.**

Copies of a final judgment, decree, or order of court and of any necessary supplementary proceedings must be submitted. Assignments by a trustee in bankruptcy or a receiver of an insolvent's estate must be supported by evidence of his qualification. Assignments by a receiver in

equity or a similar court officer must be supported by a copy of an order authorizing him to assign, or to sell, or to otherwise dispose of, the securities. Where the documents are dated more than 6 months prior to presentation of the securities, there must also be submitted a certificate dated within 6 months of presentation of the securities, showing the judgment, decree, or order, or evidence of qualification, is in full force. Any such evidence must be certified under court seal.

31 CFR, Section 306.01: Applicability of regulations:

These regulations apply to all U. S. transferable and non-transferable securities, other than U. S. Savings Bonds and U. S. Savings Notes, to the extent specified in these regulations, the offering circulars or special regulations governing such securities.

Respondent relies upon Constitution of the United States, Article I, Section 10 and Amendment V.

STATEMENT OF THE CASE

Plaintiff's statement of the case contains certain inaccuracies and rather than attempt to state each area of contention, respondent submits the following statement of the case:

For the sake of brevity and accuracy, respondent adopts as its Statement of Facts in Case No. 78-1427, the findings of fact made by the trial court (Petition Appendix, p. A-32 through A-38) and sustained by the Court of Appeals (Petition Appendix, p. A-4 to A-13) including the correction noted by the Court of Appeals that the finding that Merrill Lynch set the original trading margin of petitioner's account of $50,000.00 was not accurate. The margin limit was set at $25,000.00 by Merrill Lynch (Petition Appendix, p. A-8, Note 6).

Because Petitioner has made misleading statements on Page 6 of his petition regarding the allegations contained in Count II of the Second Amended Counterclaim, respondents hereby appends the Second Amended Counterclaim to this Brief as Addendum A, pp. B-1 to B-17, so that this court may accurately understand the trial courts finding that Count II was repetitious of Count I and III (see petitioner's Appendix A-27). In any event, the record below shows and respondent will hereinafter demonstrate, that Goldman tried both theories of commodity fraud and common law fraud, that the trial court understood Goldman's respective theories and after trial of the case rejected both.

The "gist" of Goldman's case as stated by counsel for Goldman in his opening statement at trial (Tr. 52; attached as Respondent's Addendum B, p. B-19) and as pleaded in Count I (Respondent's Addendum, B-1) was that Mr. Goldman was induced to purchase Mexican peso contracts by certain alleged misrepresentations that were made to him by Mr. Stephen Palmen, Merrill Lynch's account executive (Tr. 52), i.e. that there was no risk in investing in pesos and that there would be no devaluation of the peso until after December 1976 when a newly elected president of Mexico would take office (Tr. 53). The trial Judge declined to believe any misrepresentation was made by Palmen. (Petition Appendix, A-37).

Count II of the counterclaim alleged that the activities of Merrill Lynch and its employee Palmen regarding investment in Mexican peso contracts were part of an overall scene to defraud Goldman by getting Goldman to invest in the $50,000.00 Guided Investment Program. (Respondent's Addendum, pp. B-6, B-9). Goldman alleged in Paragraph 24 of his counterclaim that the activities of Merrill Lynch were wrongful in several respects, including that it caused excessive credits to be ex-

tended to Goldman, but defendant Goldman did not allege what he now claims as the "crux" of the alleged fraud (Page 6, Petition) "that Palmen, the broker, substituted false financial statements to his superior without Goldman's knowledge * * * in an attempt to make Goldman appear qualified for participation in this [the guided investment] program". Count II in all respects was repetitive of Count I and III and for this reason Judge Meredith dismissed Count II.

However, the trial court was appraised of Goldman's dual theories of fraud by counsel in his opening statement (Addendum B, pp. B-19 to B-25) and Goldman was allowed to introduce evidence on both theories. However, on Page 10 of the petition, Goldman attempts, by taking statements of the Court out of context, to make it appear that the court refused to hear evidence on Goldman's second theory of fraud. When the trial commenced, counsel for Goldman reserved his right to make an opening statement (Tr. 14). Thus, when counsel started to cross-examine Merrill Lynch's witness Boyton Hussey regarding the guided account program, Judge Meredith was not appraised of Goldman's theory of the case and did not believe that the evidence was relevant because Goldman did not invest in the program. (Tr. 43-44, 50-51; Petition, Page 10). At Judge Meredith's suggestion, petitioner's counsel then made an opening statement explaining that his case was based on two theories, common law fraud in that Merrill Lynch had induced Goldman to invest in pesos commodity contracts by representing that the peso was a safe investment (Tr. 52; Addendum B, p. B-20), and secondly, that Palmen made misrepresentations on the account information sheet reflecting Goldman's background and financial condition in order to qualify Goldman to invest in the Guided Investment Program (Tr. 54; Addendum B, p. B-21). Counsel further explained to the court that Merrill Lynch had a house rule that adopted the "Know Your Customer" rule of the New York Stock Exchange—that a brokerage firm is bound to

investigate its customer and evaluate his ability to trade in a particular security (Tr. 54).[1] [This second theory of fraud is sometimes referred to as Goldman's Count II theory of fraud.]

After the court was appraised of Goldman's dual theories at trial, the court permitted Goldman to introduce evidence about the Guided Investment Program (Tr. 242, 243), and to question Mr. Hussey about the amount of commissions earned by

---

[1] Petitioner's claim that the trial court did not understand petitioner's theories of fraud and therefore did not try these issues is refuted in the transcript, Page 49 to 59, which portion of the transcript is included in Respondents' Addendum B to this Brief, Pages B-18 to B-25. The final exchange between counsel and the court was as follows (Tr. Pages 61-62):

> THE COURT: What we are talking about in this case is pesos, isn't it?
>
> MR. RADLOFF: We're talking about pesos and we're talking about how it tied together. In other words, Mr. Menghini has opened up the issue about they only received the $250 which is not a very great incentive for the fraud that we allege in this case and they are showing that there was something bigger than this immediate commissions on pesos which was the incentive for this overall scheme to defraud.
>
> The big money was to be made in this guided investment program and that is what Mr. Palmen was setting Mr. Goldman up for.
>
> THE COURT: Well, I think we're getting very far afield, and since this is before the Court, if you make it brief I'm going to let you get into it very briefly, but I don't think it has one single, solitary thing to do with this lawsuit, because he never got into it. There is no dispute about that.
>
> MR. RADLOFF: That's correct.
>
> THE COURT: And if they defrauded him in this peso deal, that's one thing. If they didn't, then that's something else.
>
> MR. RADLOFF: Again, Your Honor, the other aspect is the statutory provision making the attempt unlawful and that is why he did not go through with this.
>
> THE COURT: Yes, but there's no loss on his attempting to get into that thing.
>
> MR. RADLOFF: *No*, but, Your Honor, we feel we have to have the whole picture considered to appreciate this.
>
> THE COURT: Well, make it brief. Let's go.

Merrill Lynch and account executives on the average Guided Investment Account (Tr. 64-65). Goldman did not identify for the Court of Appeals and has not indicated in his petition, what, if any, other evidence he wanted to introduce with regard to the Guided Investment Program and the alleged attempted scheme to defraud Goldman by getting him to invest in said program. The trial court ultimately found that Goldman supplied the information found in his new account form (Petition Appendix, pp. A-34) and that Merrill Lynch and Palmen made no misrepresentations and committed no violation of the Commodities Exchange Act. (Petition Appendix, p. A-37). The Court of Appeals determined that the latter finding was based to a large extent upon the district court's evaluation of the credibility of the witnesses and was unable to say that the finding of the trial court was clearly erroneous. (Petition Appendix, p. A-10).

Count III of Goldman's counterclaim (Respondents' Addendum, pp. B-6 to B-9) alleged violations of Merrill Lynch's own house rules which required Merrill Lynch to use due diligence when approving new accounts in accordance with the responsibility imposed upon them by Rule 405 [of the New York Stock Exchange]. The trial court dismissed Count III because it believed that there was no private cause of action for violation of Merrill Lynch's House Rules. (Petition Appendix, p. A-30). The Court of Appeals took a broader view of the petitioner's allegations and must have believed that he also alleged violation of Rule 405 of the New York Stock Exchange Rules,[2] and Rule 27 of the National Association of Security Dealers.[3]

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[2] Rules of the New York Stock Exchange or National Association of Security Dealers do not apply to commodity transactions. *Hirk v. Agri-Research Council, Inc.*, 561 F2d 96 (7th Cir. 1977).

[3] Defendant's counterclaim does not refer to Rule 27 and it was not asserted or introduced at trial.

The Court of Appeals held that the trial court should not have dismissed Count III because Goldman did state a cause of action by alleging violations of "exchange and dealer association rules accompanied by allegations of fraud". The Court of Appeals found that since Goldman failed to prove fraud, even if Merrill Lynch were found to have violated the exchange or association rules, the violations, in the absence of fraud, would not constitute an independent basis for liability. (Petition Appendix, p. A-13).

As demonstrated with regard to respondent's statement concerning Count II, Goldman had ample opportunity at trial to develop his dual theories of "fraud". The trial court found that Merrill Lynch had made no representations to Goldman concerning the safety of the peso, and that Goldman, not Palmen had supplied the financial data found in the New Account Information Form, Exhibit 1. Goldman does not now, nor did Goldman state to the Court of Appeals, what other evidence bearing on these issues, the trial court refused to hear or what other evidence he would have offered at trial that he did not offer with respect to Merrill Lynch's alleged fraudulent acts.

Nor could the trial court's error in finding that Merrill Lynch had set Goldman's margin trading limits at $50,000 instead of $25,000, have prejudiced Goldman under any theory of Goldman's case. Goldman's statement at P. 12 of his petition that the trial court misunderstanding prevented proving that Palmen falsified Goldman's financial statement for the purpose of raising his trading limits from $25,000.00 to $50,000.00 is a misstatement of his own theory of the case and assumes facts that did not exist. Any alleged falsification of the New Account Information Form by Palmen, would have occurred prior to the time that Goldman's margin limits were set out by Mr. Hussey, (Tr. 37) and would not have been done to get the margin "raised". The Court understood that Palmen's alleged

motive for allegedly falsifying the New Account Information on the form was to get Goldman's margin set at $50,000.00 so that he was qualified to invest in the $50,000.00 Guided Investment Program.

* * * * * * *

Respondents adopt for their statement of facts in Cause No. 78-1622, the Court of Appeals statement in that case. (Petition Appendix, A-15 to A-18).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

The Court of Appeals in the Main Appeal, Cause No. 78-1427, Reviewed the Trial Court's Finding of Fact in Accordance With the Rule Stated in Federal Rule of Civil Procedure 52(a), the Accepted Standard for Appellate Review, and Found That the Trial Court's Findings Were "Not Clearly Erroneous" and Therefore There Is Nothing Which Calls for This Court's Supervisory Powers.

Basically, what petitioner seeks, in the guise of a claim that the Court of Appeals departed from the accepted standard of judicial appellate review, is for this court to review the findings of facts and conclusions of law of the trial court and to hold such findings to be clearly erroneous. The decision of the Court of Appeals was based upon the accepted standard of review, is in accordance with Rule of Civil Procedure 52 (a) and is clearly correct. When all the evidence is considered together, Goldman can only succeed in his case, by resolution in his favor of questions of fact decided adversely to him in the trial court and in the Court of Appeals. In order for Goldman to prevail herein, this court must conclude that the trial court's finding that Merrill Lynch's account executive Palmen did not make any representation to Goldman about the safety and stability of the peso was clearly erroneous and/or (2) that the trial court's finding that Goldman, not Palmen supplied the financial data in the New Account Information sheet was clearly erroneous. It is this latter finding which Goldman now contends was erroneous, for it is this finding which precludes him from recovery under Count II and Count III of his second amended counterclaim.

Petitioner initially contends that because the court dismissed Count II and III of Goldman's counterclaim, Goldman was unable to prove "fraud". (Petition, p. 16). More particularly, petitioner, in his statement of the case, pp. 10 and 11, and in the argument section of his Petition, p. 17, incorrectly asserts that the District Court did not consider Goldman's dual theory of fraud and that the court considered only the "peso deal" and not the allegation that Palmen supplied false financial data on the New Account Form in order to qualify Goldman for the Guided Investment Program. To support this assertion, petitioner has taken the trial court's statement out of context, (See Petition, Note 2 and 3, pp. 10,11). Respondent has indicated in its statement of the case, pp. 6, 7 infra, that the trial court understood both theories, heard evidence on both theories, and largely based upon the court's view of the credibility of the witness, found that Merrill Lynch "committed no fraud, no misrepresentations and no violation of the Securities [Commodities] Exchange Act".[4] (Trial Courts Conclusions of Law, p. A-37) (See also Goldman's opening statement at trial, Respondents Addendum, pp. B-19 to B-25.) The trial court believed that the fraud alleged in connection with the Guided Account Program had "nothing to do with the lawsuit" because Goldman was not damaged by the alleged fraud (Tr. 61 and 62; see Note 1, infra). At the trial of the case, Goldman agreed he was not damaged by the alleged attempted fraud. See Note 1, infra. Ultimately Goldman lost on this so-called theory of fraud

[4] The Court of Appeals in F. N. 6 of its opinion (Petition Appendix, A-9) correctly determine that the District Court's statement in finding that Merrill Lynch "committed * * no violation of the *Securities* Exchange Act" instead of the Commodities Exchange Act, was a clerical error and that the trial court understood that Goldman's case was a commodities case. This was evident when the court considered that the trial court in Paragraph 1 of its findings of fact, (Petition Appendix P. A-33) and in Paragraph 1 of its Conclusions of Law, (Petition Appendix P. A-37), found that jurisdiction of the cause was based upon the Commodities Exchange Act. (Trial Courts, Conclusions of Law, P. A-37)

because the court believed, based upon the credibility of the witnesses that Goldman, not Palmen supplied the financial data found in the New Account Form (Trial Court's Finding of Fact, Paragraph 6 and 8, Petition Appendix, pp. A-34, A-35). The conclusion can only be that Goldman was not prejudiced by the dismissal of Count II.

Nor was Goldman prejudiced by the dismissal of Count III. Goldman had to prove fraud in order to prevail on Count III, for no private right of action exists for violation of an exchange or dealer association rule in the absence of a finding of fraud. *Shull v. Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 160 (8th Cir. 1977); *Lincoln Commodity Services v. Meade*, 558 F.2d 469, 474, Note 1 (8th Cir. 1977); *Carras v. Burns*, 516 F.2d 251, 260 (4th Cir. 1975). Goldman failed to prove fraud under either theory and therefore could not have prevailed on Count III. Cf. *Avern Trust v. Clarke*, 415 F.2d 1238, 1242 [4] (7th Cir. 1969), cert. denied 90 S. Ct. 997, 397 U. S. 963, 25 L. Ed.. 2d 555; *Gorham & Johnson, Inc. v. Chrysler Corp.*, 308 F2d 462, 469 [3] (5th Cir. 1962), cert. denied 83 S. Ct. 725, 372 U. S. 912, 9 L. Ed. 2d 719.

Goldman relies upon *McDonnell Douglas Corporation v. Green*, 411 U. S. 792, 800, 93 S. Ct. 1817, 1823 (1973), (Petition, p. 17) for the proposition that a litigant should be accorded the right to prepare his case and plan the strategy of trial with the knowledge that the dismissed claim was in the case. In the McDonnell Douglas case, the dismissed claim asserted a violation of Section 703 (a) (1) of Title VII to the Civil Rights Act of 1964, which forbids discrimination in employment decisions. The court tried the count based upon Section 704 (a) of the Act, which forbids discrimination against applicants or employees for attempting to protest or correct discriminatory employment conditions. This court rejected petitioner's contention that the trial court in fact tried both counts because both counts raised identical issues. This court found

that the question of discrimination in employment raised a broader issue than the issue tried under Section 704 (a), and specifically found that the trial court did not discuss Respondents Section 703 (a) (1) claim in its opinion and denied requests for discovery of statistical material which may have been relevant to that claim. See Note 10, 411 U. S. at 800, 93 Supreme Court at 1823.

The present case is distinguishable from the *McDonnell Douglas* case, in that in this case the trial court tried the basic facts issues involved in Goldman's Count I and II theory of fraud and made findings of fact with regard to both (See Findings of Facts, Petition Appendix, pp. A-34, A-35, Paragraphs 6, 8 and 9). Count III involved identical issues of fraud tried in Count I and II. In *McDonnell Douglas*, the trial court refused discovery of evidence relevant to a dismissed count. Here Goldman does not indicate in his petition nor did he indicate to the Court of Appeals what evidence the trial court excluded with respect to the issue of fraud alleged in Counts II and III which prejudiced his case.

Petitioner's final complaint centers around the Eighth Circuit's review of the trial court's finding that Goldman, not Plamen supplied false financial data on the New Account Form. Goldman contends that the New Account Form is "documentary" and should be treated differently (Petition, p. 19). In the final analysis, the question was who supplied the information in the form, Goldman or Palmen. The answer to this question depends on whether the court chose to believe Palmen or Goldman for their stories were diametrically opposed. Goldman testified that he was not given a copy of the New Account Form to fill out and that he did not see the form (Tr. 94). Palmen testified that when Goldman first came to Merrill Lynch's office on May 4, 1976, to inquire about purchasing peso future contracts, Palmen gave Goldman a packet of three documents to take home with him and that the New Account Information sheet

was one of them (Tr. 284, 285, 295). Palmen states that Goldman returned to Merrill Lynch on May 5 with the information completed on the form. (Tr. 285-286). Palmen further testified that it was Merrill Lynch's standard practice to take the information which the customer gave on this information sheet, discuss it with the customer and then have a secretary type the information on a similar form and discard the handwritten copy. The typed form has four copies which are distributed to different areas at Merrill Lynch (Tr. 286, 287). This was done in Goldman's case and Palmen signed the form as account executive, but the information on the form came from Goldman.

Other surrounding facts which may have influenced the trial court's finding in favor of Palmen and against Goldman, was that Goldman in July 1976 submitted a financial statement to Clayton Brokerage Company (Trial Exhibit 45) which contained financial data which Goldman admitted was erroneous, (Tr. 139) and which did not agree with Goldman's Exhibit J, which exhibit was Goldman's statement of his actual net worth in May 1976. (Tr. 121).

In any event, Palmen's account of what occurred was just as credible as Goldman's. Palmen's actions from the first in attempting to interest Goldman in the $50,000.00 Guided Investment Program would indicate Palmen must have believed that Goldman's assets were considerable, at least enough to qualify Goldman for the $50,000.00 program. Goldman admitted and the trial court found that Palmen tried to interest Goldman in the $50,000.00 program at the time of their first meeting, but that Goldman was never interested in the program, but only in pesos (Trial Court's findings, Petition Appendix, p. A-35, Paragraph 9).

The Court of Appeals considered the above evidence and was unable to say that the trial courts finding was clearly er-

roneous. (Petition Appendix, p. A-8). There is no basis for petitioner's charges that the Court of Appeals acted improperly.

Finally, the decision of the Court of Appeals, in affirming the trial courts judgment on Count III, is the correct result for Count III did not state a cause of action against Merrill Lynch. Count III alleged that Merrill Lynch violated its own house rules in several respects. (Respondents Addendum, pp. B-9 to B-15). It is respondents contention that allegations that a broker violated house rules do not state a cause of action by the customer against a broker and that the trial court was correct in so holding. (See trial court Memorandum, Petition Appendix p. A-29). Judge Meredith was convinced that the house rules were made for the protection of the broker, not the customer. See *Colonial Realty Corporation v. Bache & Co.*, 358 F2d 178, 182 (2nd Cir. 1966).

The Appellate Court's belief that Goldman's Count III was based on a violation of Stock Exchange Rules and Security Dealer Association Rules was not correct. In the first place, rules of the New York Stock Exchange and the National Association of Security Dealers would not apply to this transaction which involved only commodities. *Hirk v. Agri-Research Council, Inc.*, 561 F2d 96, (7th Cir. 1977). Goldman pleaded and introduced Rule 405 of the New York Stock Exchange, only because it was incorporated by reference in Merrill Lynch's house rules, but this would certainly not give it force and application as a *breach of an Exchange Rule*. National Association of Security Dealers Rule 27 was not pleaded by Goldman and not asserted at trial. Since Count III of Goldman's counterclaim did not state a cause of action against respondent, the trial court properly dismissed Count III and the Court of Appeals in affirming acted properly, although for a different reason. Since the Court of Appeals reached the correct result, there is no reason for this court to intervene.

II

A

The Court of Appeals Correctly Held That Treasury Regulation 31 CFR Section 350.16 (b) Did Not Exempt Goldman's Book-Entry Treasury Bills From Execution and Judicial Process and Therefore There Is No Reason to Review Its Opinion.

The Court of Appeals correctly decided in Cause No. 78-1622, *U. S. ex rel. Goldman v. Meredith et al.*, that in the absence of an express directive, it would not create a sanctuary for judgment debtors by construing Treasury Department regulations in a manner that would insulate petitioner's book-entry treasury bills from judicial process. (Opinion, Court of Appeals, Petition Appendix, A-23).

Book-entry treasury bills are a new form of government securities. They are issued in the form of an entry in the records of the Federal Reserve Bank or the Treasury; there is no engraved certificate or other tangible evidence of indebtednss. The depositor receives only a confirmation of his transaction in his book-entry account. (Opinion, Court of Appeals, Petition Appendix, A-22, A-23). Treasury bills in definitive form are no longer issued to the general public. (31 CFR Section 349.1(c).) Therefore, if 31 CFR Section 350.16 (b) is construed to prohibit recognition by the treasury department of valid judicial process in aid of execution on a judgment against a debtor-depositor, debtors, such as Goldman, by placing their assets in book-entry treasury bills could shield them permanently from execution and garnishment.

The Court of Appeals correctly determined that 31 CFR Section 350.16 (b) must be construed with the general regula-

tions governing U. S. securities. 31 CFR Section 349.2[5] specifically provides that book-entry treasury bills shall be subject, to the extent applicable, to 31 CFR Part 306, the general regulations governing United States Securities. 31 CFR Section 306.100 provides that the "Department will recognize valid judicial proceedings affecting the ownership of or interest in transferable securities, upon presentation of the securities together with evidence of the proceedings." The Court of Appeals held that 31 CFR Section 306.100 and 306.101 "demonstrate that the Treasury Department will recognize judicial process given the appropriate evidence." (Opinion, Court of Appeals, Petition Appendix, p. A-23).

Goldman argues that the Court of Appeals errored in holding that 31 CFR 306.100 was applicable to book-entry treasury bills. Goldman reasons book-entry treasury bills are not "Transferable Securities" as defined by Section 306.2 (q), therefore making Section 306.100, which pertains to transferable securities, inapplicable. (Petition, pp. 21-23). Section 306.2 (q) defines "transferable securities" as follows:

> "Transferable securities, which may be in either registered or bearer form, refers to securities which may be sold on the market and transfer of title accompanied by assignment and delivery if in registered form, or by delivery only if in bearer form."

Book-entry treasury bills may be sold on the market. They are sold daily through member banks. Although transfer is

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[5] 31 CFR Section 349.2 provides:

The Treasury bills, the issue and sale of which are herein provided, shall be subject to the book-entry Treasury bill regulations set forth in Department of the Treasury Circular, Public Debt Series No. 26-76 (31 CFR, Part 350), and, to the extent applicable, to Department of the Treasury Circular No. 300, current revision (31 CFR, Part 306), the general regulations governing United States securities. Copies of the circulars may be obtained from a Federal Reserve Bank or Branch, or the Bureau of the Public Debt.

not effected by assignment and delivery of the treasury bills in definitive form, the treasury bills held as book-entries in accounts maintained by the Treasury may be withdrawn from such account by request made by or on behalf of the depositor, and transferred through the Federal Reserve Bank Communication system to an account maintained by or through a member bank under subpart B of the Regulations. (31 CFR 350.8). Once held in the account of a member bank, transfers may be effected by any means that would be effective under applicable law to effect a transfer of treasury bills if the treasury bills were maintained by the Reserve Bank in bearer definitive form. 31 CFR Section 350.4 (b). Thus the regulations specifically contemplate that book-entry treasury bills are transferable securities as that term is defined in Section 306.2 (q).

Goldman construes Section 350.16 (b) in isolation and from this basis arrives at the conclusion that "notice" as used in that section includes a *"summons"* to garnishee or an "order" of court directing the treasury department, as garnishee, to transfer Goldman's book-entry treasury bills on behalf of Goldman through the Federal Reserve system to a member bank to be sold on the market. The Court of Appeals construed Section 350.16 (a) and (b) as a whole and found that the word "notice" was not meant to include court orders and writs of execution. It held that Goldman's interpretation of that phrase was too narrow. (Note 9, Opinion, Court of Appeals, Petition Appendix, pp. A-23, A-24).

This court in dealing with regulations concerning savings bonds, made the following policy statement in *Free v. Bland*, 369 U. S. 663, 670, 82 S.Ct. 1089, 1094, 8 L. Ed. 2d 108:

> While affording purchasers of bonds the opportunity to choose a survivorship provision which must be recognized by the States, the regulations neither insulate the purchasers from all claims regarding ownership nor immunize the bonds from execution in satisfaction of a judgment.

The Solicitor General, appearing as amicus curiae, acknowledges that there is an exception implicit in the savings bond regulations, including the survivorship provision, so that federal bonds will not be a "sanctuary for a wrongdoer's gains."

The Court of Appeals properly ruled that treasury regulation 31 CFR 350.16 (b) did not exempt Goldman's book-entry treasury bills from execution and garnishment.

B

If Under 31 CFR 350.16(b), the Treasury Department Contracted With Goldman Not to Recognize Merrill Lynch's Writ of Execution and Summons to Garnishee Against Goldman's Book-Entry Treasury Bills, Then the Regulation Retroactively Deprived Merrill Lynch of Property Without Due Process in Violation of the 5th Amendment to the Constitution of the United States and Is Void as to Merrill Lynch's Transaction With Goldman.

Furthermore, if 31 CFR Section 350.16(b) is construed to prohibit recognition by the Treasury Department of valid judicial process in aid of execution on Merrill Lynch's judgment against Goldman, said regulation arbitrarily and capriciously deprives Merrill Lynch of the right to collect its indebtedness and judgment against Goldman and thereby deprives it of its property without due process of law in violation of provisions of the 5th Amendment of the Constitution of the United States.

The effect of construing 31 CFR 350.16(b) in such a manner is to cause said book-entry treasury bills to be exempt from execution and garnishment and impairs Merrill Lynch's ability to collect the debt which Goldman owes Merrill Lynch. The exemption as to Goldman's treasury bills would not be effective until Goldman invested his assets in treasury bills, which occurred after his indebtedness to Merrill Lynch became fixed on September 8, 1976. Goldman did not purchase the treasury bills until January and February of 1978 (Court of Appeals Decision, Petition Appendix, p. A-15). Furthermore, according to 31 CFR 350.0(a)(1), book-entry treasury bills could not be purchased until after December 1, 1976. Goldman's debt to Merrill Lynch existed before the exemption was created by regulation or was created by contract obligation between Goldman and the Treasury Department and the exemption constitutes an unwarrantable interference with Goldman's contractual obligation to Merrill Lynch in violation of constitutional provisions.

Rights acquired by a creditor before and after a judgment are property rights which cannot be taken without due process of law. The judgment and garnishment in the instant case afforded the appropriate means of enforcing Goldman's contractual obligations and the regulation, as well as the alleged contract made by Goldman with the Treasury Department after he had incurred a debt to Merrill Lynch, altered Merrill Lynch's substantial rights to have its existing debt paid. *W. B. Worthen Company v. Thomas*, 292 U. S. 426, 78 L.Ed. 1344, 54 S.Ct. 816, 93 ALR 173, 176 (1934). If 31 CFR 350.16(b) is construed, as urged by Goldman, to cause said book-entry treasury bills to be exempt from execution and garnishment, then it would retroactively impair Merrill Lynch's claim against Goldman. Article I, § 10 of the United States Constitution which prohibits a state from impairing the obligation of a contract, prevents a state from enacting a retroactive statutory exemption, without limitation or restriction, exempting property from liability for the payment of a debt. *W. B. Worthen Company v. Thomas*, supra. And the Federal Government may not under the due process clause so deprive a judgment creditor. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 559, 560-561, 79 L.Ed. 1592, 1604, 1611, 55 S.Ct. 854, 97 ALR 1106 (1935).

CONCLUSION

Respondent respectfully submits that petitioner would have this court review the findings of fact of the trial court in No. 78-1427 and find that those findings are clearly erroneous, a function this court has repeatedly declined to perform. As demonstrated herein, the opinion of the Court of Appeals indicates that the court carefully reviewed the evidence below and correctly found that the trial court's findings of fact was not clearly erroneous. Furthermore, the Court of Appeals found that the trial court considered each of Petitioner's alleged theories of fraud. Because Goldman was unable to prove fraud, he was not prejudiced by the trial court's dismissal of Count III. There is no need for this court to exercise supervisory powers under the circumstances.

Although the issues presented by the supplementary appellate proceeding No. 78-1622 may be of importance, the Court of Appeals correctly ruled that book-entry treasury bills are not a debtor's haven, and there is no need for this court to intervene.

It is therefore respectfully requested that this Honorable Court deny this petition for writ of certiorari.

Respectfully submitted,

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ADDENDUM

ADDENDUM A

SECOND AMENDED COUNTERCLAIM

(Filed August 18, 1977)

Comes now Defendant Sam Goldman, and with leave of Court, states for his Second Amended Counterclaim against Plaintiff as follows:

Count I

1. That this Court has jurisdiction of this cause of action pursuant to the grounds set forth in Plaintiff's Amended Complaint.

2. That Defendant Sam Goldman (hereinafter "Goldman") is a resident of St. Louis County, and that Plaintiff is a corporation organized and existing by the laws of the State of Delaware, with one of its principal places of business in the County of St. Louis, Missouri.

3. That Plaintiff is a securities and commodities investment broker and advisor and is in the business of investments for itself and by and through its numerous domestic and foreign subsidiaries and is a member of various stock exchanges, boards of trade and exchanges dealing in various stocks, bonds, securities, commodities, futures and other financial instruments, including dealing with futures and contracts for the sale, among other items, of Mexican pesos issued by the Government of Mexico.

4. That commencing on or about the 4th day of May, 1976, and continuing for a subsequent period of time as hereinafter set forth, Plaintiff, acting by and through its agent, servant and employee, Stephen Palmen (hereinafter "Palmen"), a commodities broker licensed by the Commodities Future Trading Com-

mission, did discuss with Defendant Goldman the matter of said Defendant's investment of funds in various commodities and futures contracts, particularly Mexican peso contracts.

5. That during the period of the relationship between Plaintiff and Defendant Goldman, said Defendant was unsophisticated in the fields of commodity and other financial investments, and in particular, in the areas of futures trading, margin investments, and specifically Mexican peso contracts, all of which information Defendant Goldman related to Plaintiff, by and through said agent Palmen, and that Plaintiff knew and realized that Defendant was not knowledgeable in such areas.

6. That Defendant Goldman did indicate to Plaintiff, by and through its said agent Palmen, that he did not wish to become involved in any investment that was speculative or involved any significant degree of risk, whereupon said agent Palmen did indicate that Plaintiff would undertake to investigate and inquire into the financial propriety, suitability, stability, wisdom and feasibility of investing Defendant Goldman's funds in the purchase of Mexican peso contracts, and whether such an investment would be a safe investment.

7. That throughout Plaintiff's initial discussions with Defendant Goldman, conducted through its said agent, servant and employee, Palmen, it did represent and hold itself out to be a full service brokerage house and financial advisor and expert in the field of commodities trading, and specifically Mexican peso contracts, and indicated to Defendant that he should rely upon their expertise and recommendations, and otherwise place full confidence and trust in them.

8. That Plaintiff, acting through its said agent, servant and employee, Palmen, did indicate that it had a number of contacts and sources, both within its own organization, and elsewhere, particularly on the West Coast and in Mexico, from whom it

could make inquiry and determine the suitability and safety of Defendant investing his funds in Mexican peso contracts.

9. That Plaintiff, acting through said Palmen, as aforesaid, did so undertake to make inquiry and investigation as to the safety, security, and suitability of Defendant Goldman making such an investment, contacting both its own and other external sources and contacts, as aforesaid, and based upon those inquiries did represent that there was no possibility that the Mexican peso would be devalued during the year 1976, and that accordingly, investment in Mexican peso contracts was a safe and sound investment posing no risk to Defendant's investment capital.

10. That Plaintiff, by and through said Palmen, as aforesaid, did further represent to Defendant Goldman that it would use its financial expertise, information sources, and investment judgment to advise said Defendant how to invest his funds, especially in the field of commodities and Mexican peso contracts, and thus and thereby make a profit for Defendant.

11. That subsequently, (based upon the aforesaid representations made by Plaintiff, by and through its said agent, servant and employee, Palmen, and upon the advice and solicitations, as aforesaid,) Defendant Goldman ultimately delivered and entrusted to Plaintiff the approximate aggregate sum of Twelve Thousand Dollars ($12,000.00) for the purposes of purchasing Mexican future peso contracts, and that Plaintiff, by and through its agents, servants and employees, and in particular, said Palmen, did effect the purchase of Mexican peso contracts on the following dates: May 6, 1976; May 12, 1976; June 18, 1976; July 2, 1976; and August 11, 1976; all of which contracts were purchased on margin of less than ten percent (10%) of the total purchase price, and all of which purchases were transacted and brokered by Plaintiff and said Stephen Palmen.

12. That of the five (5) said peso contracts, the latter contracts were purchased for Defendant Goldman by Plaintiff by "pyramiding" said Defendant's paper profits on the earlier purchased peso contracts, all at the urging, suggestion, and advice of Plaintiff, and its agent, Palmen, as aforesaid, thereby not only generating additional commissions and income to Plaintiff, and its said agent, Palmen, but also for the purpose of Plaintiff and said Palmen gaining Defendant Goldman's confidence and trust in them, and thereby, also increasing the magnitude of said Defendant's financial commitment in Mexican peso contracts and his overall investment with Plaintiff.

13. That subsequently, on or about August 31, 1976, while Defendant Goldman was still holding said future peso contracts, and before their maturity date, the Government of Mexico did announce that the peso would no longer be supported at a fixed parity price, but rather would be allowed to "float" at the market value with reference to other world curriencies, which actions were in effect a de facto devaluation of the peso.

14. That as a result of said announcement and "devaluation," the trading value of the Mexican peso, and the contracts for the same in which Defendant had invested upon Plaintiff's and said Palmen's representations, urgings, and advice, did suffer a substantial drop in value of approximately one-half (½) and that as a result thereof, Plaintiff did request Defendant Goldman to deposit One Hundred and Twenty-five Thousand Dollars ($125,000.00) to cover the alleged drop in value and meet the margin requirements as claimed by Plaintiff, which request Defendant Goldman was unable to meet, and which request was wrongful and improper in that it was occasioned by the failure of the investments suggested by Plaintiff, and its said agent, to be of the quality, safety, and stability represented, as hereinbefore set forth.

15. That Plaintiff did subsequently liquidate and cash out Defendant Goldman's margin account on or about September 9, 1976, thereby causing Defendant to lose his total investment capital aggregating approximately Twelve Thousand Dollars ($12,000.00).

16. That Defendant Goldman's loss, as aforesaid, was a direct and proximate result of the fraudulent and wrongful misrepresentations made by Plaintiff and its agent, servant and employee, Palman, with respect to the representation that investment in Mexican peso contracts was a safe and sound investment, and for the further misrepresentation that Plaintiff and its agent Palmen had an "inside source" upon which they represented that there was no chance that the peso would be devalued in 1976, all of which representations were false, and which Plaintiff and said Palmen knew, or should have known, were false, but which were made with the intent that Defendant Goldman should rely upon them, and that he did so in fact rely upon them, and which representations were material, and were made for the utlimate purpose, and with the intent, to defraud Defendant into investing and entrusting his monies to Plaintiff and said Palmen for their benefit, all of which actions were contrary to and in violation of the duties owed by Plaintiff and its agent Palmen to Defendant Goldman to protect and preserve Defendant Goldman's investment interests and to avoid such losses, and which did damage Defendant Goldman and result in the loss of the sum of Twelve Thousand Dollars ($12,000.00).

17. That the actions and misrepresentations of Plaintiff, acting by and through its agents, servants and employees, and in particular said Palmen as hereinbefore set forth, did represent a violation of the Commodities Exchange Act, and in particular 7 U.S.C., Section 6(b) and (o).

18. That the actions of Plaintiff and its agent were wrongful and unlawful and done with a willful and malicious intent to

enrich itself at Defendant's expense and without regard for Defendant Goldman's financial well-being or the security of his investments, and that before Defendant Goldman is entitled to punitive damages in the sum of Five Hundred Thousand Dollars ($500,000.00).

WHEREFORE, Defendant Goldman prays judgment against Plaintiff for his actual damages in the sum of Twelve Thousand Dollars ($12,000.00), and for further judgment in the sum of Five Hundred Thousand Dollars ($500,000.00) punitive damages, together with interest thereon and the costs of this action, and for such other and further relief as to the Court seems just and proper.

Count II

Comes now Defendant Sam Goldman, and for Count II of his cause of action, states as follows:

19. Defendant herein adopts and reincorporates by reference, as if fully set forth herein, paragraphs 1 through 18 of Count I herein.

20. That the activities and misrepresentations of Plaintiff, and its agents, servants and employees, especially said Palmen, as aforesaid, regarding investment in Mexican peso contracts were part of a larger overall scheme, artifice and device to defraud and entice Defendant Goldman into investing greater sums of money with Plaintiff.

21. That these activities and misrepresentations of Plaintiffs and its agents, servants and employees, were intended as an inducement to initially obtain Defendant Goldman as a client, and to subsequently solidify its hold upon Defendant Goldman by committing said Defendant to commit large sums of monies in various commodities, investments and futures trading, and thus and thereby to cause said Defendant to become dependent upon

Plaintiff and its agent Palmen for advice and guidance to protect his investments.

22. That the object of Plaintiff's and Defendant Palmen's scheme, and the activities comprising it, was to induce Defendant Goldman to commit Fifty Thousand Dollars ($50,000.00) of his funds to Plaintiff in what was known as a guided investment program in commodities which Plaintiff offered, wherein Plaintiff would be given Fifty Thousand Dollars ($50,000.00) by Defendant Goldman to invest in various commodities and futures transactions and investments as Plaintiff saw fit, and at its discretion; which investment program represented a profitable and lucrative source of business to Plaintiff.

23. That as a result of Plaintiff's and its agent Pulmen's activities in perpetrating the aforesaid fraud upon Defendant Goldman, said Defendant was damaged in the amount of Twelve Thousand Dollars ($12,000.00), representing that portion of his investments which were lost, as set forth in greater detail in Count I.

24. That the activities and scheme of Plaintiff was wrongful in that:

(a) The initial misrepresentations concerning the safety and stability of the Mexican peso, which were made to induce Plaintiff to invest his funds and become a client of Merrill Lynch, were falsely, fraudulently, and recklessly made, all as hereinbefore set forth in Count I;

(b) Plaintiff and its agents, servants and employees, especially said Palmen, failed and omitted to advise Defendant Goldman, in the course of their dealings, either orally or in writing, that investment in any commodities or futures transaction was inherently speculative and involved a high degree of risk, which failure and omission was contrary to both good brokerage practice and market

exchange rules and regulations then operating upon Plaintiff and governing the transactions;

(c) That in the course of inducing and encouraging Defendant Goldman to commit greater sums of his funds into investments with Plaintiff, thereby increasing its hold over Defendant, Plaintiff, by and through its agents, servants and employees, especially said Palmen, caused excessive credit to be extended to Defendant Goldman, which actions were wrongful, unlawful, and improper in that:

(1) Said excessive credit exposed Defendant Goldman to investments of a greater magnitude and risk far beyond his means and ability;

(2) Such activities were contrary to good brokerage practice and conduct, and the duties owed Defendant Goldman arising from the broker/client relationship; and

(3) Such activities violated Plaintiff's own house rules and corporate policies pertaining to the extension of credit and margin, as set forth in greater detail in Count III herein.

(d) Defendant Goldman, by Plaintiff's own standards, house rules, and corporate policy, did not qualify, either in terms of financial ability, worth, and holdings, or investment personality and temperament, for the type of investment programs, guided or otherwise, which Plaintiff, and its agents, servants and employees, especially said Palmen, involved, or attempted to involve, Defendant Goldman in, as set forth in greater detail in Count III herein;

25. That because of the wrongful nature of Plaintiff's and its agent Palmen's activities, as aforesaid, and particularly in consideration of the fact that this is not the first time Plaintiff

has shown such a reckless disregard for the welfare, financial and otherwise, of its customers and clients, all of which evidences a wanton, willful and malicious intent and attitude on its part, punitive damages in the sum of Five Hundred Thousand Dollars ($500,000.00) are justified, both as punishment to Plaintiff for its misdeeds already committed as against Defendant Goldman, and as an exemplary incentive and example to prevent and deter Plaintiff and others who would engage in similar misconduct and misrepresentations in the future.

WHEREFORE, Defendant Goldman prays judgment against Plaintiff in the sum of Twelve Thousand Dollars ($12,000.00) for his actual damages, and Five Hundred Thousand Dollars ($500,000.00) punitive damages, and for interest on his monies expended from the date of investment, and for his costs expended herein.

Count III

Comes now Defendant Sam Goldman and for Count III of his cause of action, states as follows:

26. That Defendant herein adopts and reincorporates Counts I and II, and all paragraphs thereof, as if fully set forth herein.

27. That Plaintiff, at all times hereinbefore mentioned, acting as broker for Defendant Goldman, had a basic duty to supervise and review said Defendant's commodities trading account, both as a matter of law and under its own business rules and policies (which rules and policies are hereinafter set forth in greater detail), to determine what kind of trading account and margin credit limits Defendant qualified for, if any, as well as to periodically review Defendant's trading activities and accounts to insure their compliance within the trading activities and limitations set for said Defendant.

28. That Plaintiff, at all times mentioned herein, was the employer and principal of said Palmen, and in such capacity had a duty to supervise and review all actions and conduct of said Palmen's methods of handling the affairs and activities of Defendant Goldman's commodities trading account to insure that its own duty and responsibility to Defendant Goldman, as aforesaid, were being carried out and fulfilled as provided by law and by its aforesaid own rules.

29. That among the policy statements and rules which Plaintiff has adopted to effectuate the same are the following:

(a) That Merrill Lynch Rules 05.32.1, 09.12, and Policy Bulletin No. 76-12 set certain Acceptance Standards for commodity accounts, included among which is the requirement of an annual income of Twenty-five Thousand Dollars ($25,000.00);

(b) That the aforesaid two (2) Rules also state that:

> As a basic policy, the Corporation does not wish to handle speculative commodity business for individuals who cannot afford the risks, and for those who are temperamentally not suited to commodity trading.

(c) Said Rules further state that:

> We do not wish to handle speculative commodity business for individuals with small net worth or small annual income. *Neither do we wish to handle business for those individuals regardless of net worth or income whose losses would be detrimental to their standard of living nor* for those whose family responsibilities are such that any loss of capital would *impair the financial security of the individual* and his dependents. (Emphasis added).

(d) Rule 05.32, governing approval of new accounts states that:

> . . . all persons who exercise this authority [to approve new accounts] on behalf of the Corporation should be aware of the responsibility imposed on them by Rule 405 to use due diligence when approving new accounts.

and continues that:

> The consequences of incomplete or incorrect information on a new account form are the responsibility of the individual accepting the account as well as the account executive who opens it.

30. That Plaintiff and said Palmen, in permitting Defendant Goldman to open a commodities trading account, breached their duty to Defendant Goldman in that said Defendant did not qualify for the following reasons:

(a) Defendant did not have an annual income of Twenty-five Thousand Dollars ($25,000.00); his own income in fact being substantially beneath that required amount;

(b) That Defendant Goldman was, at all times relevant herein, sixty-five (65) years of age, semi-reitred, and basically living on a fixed income, and therefore neither financially nor temperamentally suited to engage in commodities trading and the extreme risks inherent therein; and

(c) That the type, degree, and magnitude of the commodities trading and investment activity which Plaintiff and its said agent Palmen permitted Defendant Goldman to engage in involved such risks and exposed said Defendant to such potentially large unsecured liability (almost Four Hundred Thousand Dollars ($400,000.00)) that the realization of even a small portion of said potential liability,

as is in fact presented by Plaintiff's claim for almost One Hundred and Twenty Thousand Dollars ($120,000.00), would be detrimental to Defendant Goldman's general standard of living and impair his financial security.

31. That notwithstanding Plaintiff's and its said agent Palmen's failure to effectively screen Defendant Goldman's qualifications and suitability to engage in commodities trading. Plaintiff and said Palmen further breached their duty to Defendant Goldman in the following respects:

(a) That said Palmen failed to use due diligence, as required by Merrill Lynch Rule 05.32, as aforesaid, in obtaining the financial information on Defendant Goldman necessary to establish his commodity trading limits, and as required by Plaintiff's New Accounts form; and that Plaintiff's office manager, one Boynton Hussey, as agent, servant and employee of Plaintiff, also failed to exercise due diligence, as required by Merrill Lynch Rule 05.32, both in approving said New Account form and in accepting Defendant Goldman's account;

(b) That the New Accounts form filled out by said Palmen indicated Defendant Goldman had a net worth of Two Million Dollars ($2,000,000.00) and an annual income of Fifty Thousand Dollars ($50,000.00), which information was wrong and inaccurate; Defendant Goldman's actual financial worth, at that time, being approximately Two Hundred and Thirty Thousand Dollars ($230,000.00), and his annual income then being approximately Sixteen Thousand Dollars ($16,000.00);

(c) That based upon the unverified and inaccurate information, as aforesaid, Plaintiff nonetheless extended Defendant Goldman a line of credit with margin deposits limits of Twenty-five Thousand Dollars ($25,000.00), thereby permitting said Defendant to purchase investments carry-

ing obligations many times that amount, which margin trading limits were excessive and which in fact ultimately led Plaintiff to permit Defendant Goldman to purchase the aforesaid five (5) Mexican peso contracts with a potential unsecured liability of approximately Four Hundred Thousand Dollars ($400,000.00); which sum was substantially in excess of said Defendant's net worth;

(d) That notwithstanding the wrongfulness and excessiveness of the line of credit and margin trading limits extended by Plaintiff to Defendant Goldman, as aforesaid, both Plaintiff and its said agent Palmen nonetheless permitted Defendant Goldman to exceed the margin trading limits Plaintiff had set for Defendant Goldman by Seven Thousand Dollars ($7,000.00), which further compounded said Defendant's investment over-exposure;

(e) That it was not until on or about August 16, 1976 that Plaintiff finally became aware that Defendant Goldman was over the authorized margin trading limits Plaintiff had established for him, but that no action was taken to reduce said Defendant's trading position to within those margin trading limits established by Plaintiff, such that when the peso "devalued," on or about August 31, 1976, over two (2) weeks later, said Defendant's trading position was still over-extended, such that the subsequent loss of investment capital was almost thirty percent (30%) greater than it otherwise should have been; and

(f) That it was not until on or about August 20, 1976, well over three (3) months since Defendant Goldman's line of credit and margin trading limits had been established, that Plaintiff recognized a substantial discrepancy between Defendant Goldman's financial net worth and annual income as indicated by Defendant Palmen on the New

Account information form ($2,000,000.00/$50,000.00) and between the information indicated on a credit report requested and received by Plaintiff shortly after the account was opened indicating that Defendant Goldman had a net worth of Four Hundred and Seventy Thousand Dollars ($470,000.00) and an annual income of Thirty-two Thousand Dollars ($32,000.00) (neither of which reports were accurate as aforesaid); by which time Plaintiff had already permitted Defendant Goldman to trade beyond even Plaintiff's own inflated margin trading limits established by it for Defendant Goldman.

32. That the negligence of Plaintiff's failure and omission to screen Defendant Goldman as a prospective client, or to supervise and review his account and trading activities once it was opened, was compounded by Plaintiff's failure to supervise the activities of its said agent Palmen insofar as Plaintiff knew, at the time it was considering the hiring of said Palmen:

(a) That said Palmen had been the subject of several formal complaints and objections by former customers at his previous place of employment regarding the handling of their accounts; and

(b) That a response from said Palmen's former employer to a questionnaire prepared by Plaintiff indicated that the former employer would not re-employ said Palmen because of the existence of the aforementioned formal complaints, and because of said Palmen's attitude toward resolving those complaints.

33. That Plaintiff has, and at all times relevant herein, did hold itself out to be a reputable, responsible full service brokerage house and whom the public generally, and Defendant Goldman specifically, should place their trust and confidence and that

the foregoing policies and rules promulgated by Plaintiff were for the benefit and protection of Defendant Goldman, who had a right to rely upon them, and who did in fact rely upon them, and upon the integrity with which Plaintiff represented and held itself out to Defendant Goldman and the public generally.

34. That as a direct and proximate result of Plaintiff's and its agent Palmen's failure at self regulation, and to exercise due diligence and basic supervision of Defendant Goldman and his account, said Defendant was caused and allowed to invest the sum of Twelve Thousand Dollars ($12,000.00), which sum was lost as a result of Plaintiff's and said Palmen's negligence, as aforesaid.

WHEREFORE, Defendant Goldman prays judgment against Plaintiff for the sum of Twelve Thousand Dollars ($12,000.00) together with interest thereon, for the costs of this action, and for such other and further relief as to the Court seems just and proper.

Count IV

Comes now Defendant Sam Goldman and for Count IV of his cause of action, states as follows:

35. That Defendant herein adopts and reincorporates Counts I, II and III, and all paragraphs thereof, as if fully set forth herein.

36. That during the course of the investment relationship between the parties, during which time Defendant Goldman purchased the aforesaid five (5) peso contracts, Plaintiff, by reason of its dominant position in the international investment community, and in particular by reason of its close relationship with the Government of Mexico arising out of several substantial

bond issues which it was underwriting, had inside information relating to the imminent and pending "devaluation" of the peso.

37. That during the aforesaid period of time when Defendant purchased said peso contracts, Defendant has reason to believe, and does believe, that Plaintiff did divulge this advance information to certain of its preferred, selected customers and investors.

38. That Defendant has reason to believe, and does believe, that these preferred customers and investors did make purchases and/or sales based upon this inside information during the same period of time when Defendant was engaged in the purchase of the aforesaid five (5) peso contracts.

39. That in so doing, Plaintiff was acting fraudulently and deceitfully with an intent to defraud other, noninformed investors, including Defendant, who purchased during this same period of time.

40. That the knowledge of the pending "devaluation" of the peso was a material piece of information, which did have a substantial effect upon the investment market.

41. That the disclosure of this information to certain insiders and selected and preferred customers was wrongful by Plaintiff, and done with an intention of manipulating the market in favor of certain preferred customers, and to Plaintiff's advantage.

42. That in so acting, Plaintiff was acting with a reckless disregard for the truth and for the financial welfare of Defendant and his investments.

43. That as a direct and proximate result of said actions by Plaintiff, Defendant was damaged in the sum of Twelve Thousand Dollars ($12,000.00).

WHEREFORE, Defendant prays judgment against Plaintiff in the sum of Twelve Thousand Dollars ($12,000.00).

Respectfully submitted,

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ADDENDUM B

Transcript of Trial, Cross-Examination of Boynton Hussey, and Goldman's Opening Statement, Tr. pp. 49-59.

* * * * * * *

[49] Q. Mr. Hussey, I next show you Exhibit 9 and 9A and ask you what they are requesting?

MR. MENGHINI: Your Honor, again, these exhibits and this information is all information that the Merrill Lynch Company was gathering for its own information, and we're not getting back to what contending is a violation of a house **[50]** rule or our own rules. Your Honor has already dismissed count three which we moved to dismiss. It was filed in the counterclaim which raised that very question. That's not a part of this case and I am going to object on the basis of relevancy.

MR. RADLOFF: First of all, 9 and 9A are Mr. Palmen's requests that the margin limits be raised.

MR. MENGHINI: That's right, within our own houses requesting that margin limits be raised. How that's relevant to this case I fail to see.

MR. RADLOFF: And I explained, or Mr. Fredericks explained a great deal of this defense, Your Honor, goes to the fact that Mr. Palmen, as we allege was defrauded or attempting to be defrauded into getting involved in this guided investment program and that to have qualified him in the guided investment program, Mr. Palmen would have had to request that Mr. Goldman's trading limits which had only been $25,000 be raised to the minimum of $50,000 which is the minimum requirement.

MR. MENGHINI: That has not been established, and in any event that's nothing more than a house rule.

THE COURT: Well, I understand that, but the facts are, as I understand it, and you'll correct me if I am wrong, he did not get in this program. Is that right?

[51] MR. RADLOFF: That's correct, Your Honor.

THE COURT: All right. Then I don't want to hear any more about this program.

MR. RADLOFF: May I cite you one point. Part of our case, Your Honor,—it's in two parts—even in count one. It's common law fraud and it's also statutory violation of Commodities and Exchange Act, and under Section (6) (b) it covers an attempt to cheat or to defraud, and that is a basis upon which we are——

THE COURT: I understand that's an attempt, but he didn't get into it.

MR. RADLOFF: But they committed the attempt. They were attempting to hook him to get into commodities by getting him first involved with pesos. From there they would have escalated his investments. Unfortunately, the market collapsed before they could get him involved in the $50,000 program.

THE COURT: Well, since you haven't made a statement of what your case is all about, and the Court hasn't had the benefit of that, I really don't know what your case is all about. So why don't you just get over there now and tell me what you're contending about this case. I'd like to hear about it so I will be informed.

MR. RADLOFF: Do you want to do it?

[52] MR. FRIEDMAN: No, you do it.

MR. RADLOFF: Your Honor, on the basic transactions, as we have stated before, there is no agreement, but the gist of our case deals with the allegation on our part that Mr. Goldman was induced to enter into these peso transactions on the basis of certain misrepresentations that were made to him by

Mr. Stephen Palmen as the account executive of Merrill Lynch. There is a divergence of facts when we get to the initial meeting of May the 4th. That was Mr. Goldman's first contact with Merrill Lynch. He had received this so-called McKeever's letter. He was not a subscriber; he had never requested it. It came in the mail unsolicited to him.

It mentioned the fact that high rates of returns were possible by investing in these so-called Mexican pesos futures contracts, and Mr. Goldman, I think, read the article sometime in April when he received it, kept it in the back of his head, and then eventually got around to calling Merrill Lynch to inquire about these things.

He had no experience previously in commodities or even stocks and bonds actually.

At that time, as Mr. Menghini indicates, he went to Merrill Lynch—he made a phone call first, was put in touch with Stephen Palmen, account executive who suggested, "Why don't you come in? We'll talk about it." He indicated, **[53]** "If you are interested bring $7,000." That would be the margin requirement.

Mr. Goldman didn't bring any margin money with him that day. He wanted to talk about it and find out about what these investments were all about.

Now, Mr. Goldman will indicate in his testimony that he went in, he brought the article with him, this McKeever's letter as it's called, and asked for Merrill Lynch of Mr. Palmen in particular to explain to him what it was all about and what kind of risks, if any, are involved in it. Does it indeed have this high rate of return?

And Mr. Palmen indicated that he would contact their people to find out about this investment, and he first indicated that

he contacted Merrill Lynch's people in the Chicago Monetary Market on the International Monetary Market.

His response there was coupled with another response that he indicated he had called their people in California, that they have a source in the West Coast who was very close to Mexico. And Mr. Goldman was informed that on the basis of these two calls that, number one, the peso is a safe commodity and, number two, there will be no devaluation in Mexico at least not until after December of 1976 as that is when a new election had been held and the new president was to take office. So until that change of **[54]** administration took place, Merrill Lynch could assure Mr. Goldman that there would be no devaluation.

On that basis primarily, Mr. Goldman went ahead and committed $7,000 which he brought back the next day. He did not have the money with him that day until he found out about this investment.

He came back the next day; he brought $7,000 with him and at that time he filled out Exhibits 2 and 3 which is the authority to Merrill Lynch to act as agent and to place the contracts and make the deposits of the funds.

Now, at that time there was also new account information sheet that Stephen Palmen caused to be filled out. There was a great difference here of fact because it is the information on that new account sheet reflecting Mr. Goldman's background which is also part of our lawsuit, that this misrepresentation was made by Mr. Palmen of the information in that sheet so that he could convince his superiors to allow Mr. Goldman to trade at these more advanced programs that Merrill Lynch offered.

Now, on that sheet there are such facts that Mr. Goldman was a married individual, that he was a manufacturer's repre-

sentative, that he had income of approximately two million dollars and that he had an annual income or a net worth of two million dollars and an annual income of about **[55]** $50,-000, none of which Mr. Goldman gave Mr. Palmen.

The only information Mr. Goldman gave Mr. Palmen was basic facts as to his name, address, two bank references, and that was it. Mr. Goldman never signed Exhibit Number 1.

At that point, as I say, Mr. Goldman didn't know of the existence of this document until much further on in the September 7 meeting.

In any event, in the course of dealing with Mr. Goldman and Mr. Palmen at Merrill Lynch over the next four months during which time these next five contracts were purchased, it is Mr. Goldman's position that he will so testify that during this period of time he came to rely very heavily on Mr. Palmen; he didn't know anything about the commodity markets; he didn't know anything about the concept of taking delivery and fluctuations involved, and he relied quite heavily on Mr. Palmen for his knowledge and expertise, and that Stephen Palmen through the course of these dealings would at numerous times make suggestions to Mr. Goldman as to what to buy and what not to buy, when to buy another peso, things like that, and that throughout this entire period beginning from the very first meeting and sporadically throughout, Mr. Palmen was always pushing Mr. Goldman about getting into this $50,000 guided investment program.

And we are prepared to put on evidence which will **[56]** show that this program was indeed a very lucrative source of income to Merrill Lynch. $50,000 program in a year's time would normally turn about 400 to 450 transactions. At $50 a transaction that's over a $20,000 a year in commissions for which the individual broker himself got 27 per cent which comes to over $5,000 for him.

And it is that basis that we allege that there is what amounts to a conspiracy, although we are not pleading a conspiracy, but what is tantamount to a scheme to defraud Mr. Goldman first by getting him hooked on pesos and indeed, if the market had held steady, he would have gotten a very handsome return which would have made Merrill Lynch look very good and then eventually get him into this more lucrative which was much more profitable to Merrill Lynch insofar as we believe it appears that the Mexican peso contract was only a lost leader, so to speak.

And that basically is the gist, that he was misrepresented on the actual peso investment and also as to this larger, overall scheme to hook him into making these larger commitments of money to Merrill Lynch.

THE COURT: Let me ask you this: do you contend it is fraudulent to get into that program of investment with Merrill Lynch?

MR. RADLOFF: We do, Your Honor, because Mr. **[57]** Goldman was nowhere near to be qualified as to the type of individual who should invest in that type of program.

THE COURT: What is the basis of that now?

MR. RADLOFF: These misrepresentations about Mr. Goldman's financial background. Had the truth been known from the very beginning, and had Mr. Hussey and other people who supervised and review these new accounts known the background of Mr. Goldman, there was no way, either Merrill Lynch's standards or just good general broker knowledge in the industry that Mr. Goldman should have been allowed to get involved in these type of commodities.

THE COURT: Well now, is it your contention that Merrill Lynch has a rule?

MR. RADLOFF: Merrill Lynch has a rule which we believe reflects——

THE COURT: What is the rule?

MR. RADLOFF: The rule is—I have it here, Your Honor. I haven't the specific number, but in essence what it does is it reflects and re-incorporates the "Know your customer rule" of the New York Stock Exchange, that a brokerage firm is bound to investigate and to go to some lengths to find out all that they can about their customer as to evaluate his ability to trade in the particular commodity or security or whatever the investment is.

[58] THE COURT: I understand that, but what is the—what is the rule that Merrill Lynch violated?

MR. RADLOFF: In part, Your Honor, that is reflected by the Hecht opinion which sets forth the standard and duty of a brokerage company to know the customer, to accurately set forth the information about him, to find this out, to verify it, things of that nature, and it's also reflected again in their own house rules.

THE COURT: Which is what?

MR. RADLOFF: Which we have here—let's see. Okay. This is from Merrill Lynch's house rules, Your Honor, and reflects the rule 405 which they incorporate, I think.

THE COURT: What is 405?

MR. RADLOFF: Here it is, Your Honor.

THE COURT: Where's the rest of that rule?

MR. RADLOFF: That was all that Mr. Menghini furnished us. That is in response to our interrogatories to identify rule 405 and that is the response that Merrill Lynch furnished us with.

THE COURT: Okay.

MR. RADLOFF: We had also cited to the Court on Hecht the page 438 where we believe it specifically sets forth the depth and detail of this duty to know their customer as a matter of law and good brokerage practice.

[59] THE COURT: All right. Continue. Go ahead.

* * * * * * *

Supreme Court, U.S.
FILED
AUG 23 1979
MICHAEL RODAK, JR., CLERK

No. 78-1842

In the Supreme Court of the United States

OCTOBER TERM, 1978

SAM GOLDMAN, PETITIONER

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of two related decisions of the United States Court of Appeals for the Eighth Circuit. In the first decision, respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") recovered a judgment for deficiency in petitioner's commodities margin trading account, and the court of appeals affirmed (Pet. App. A4-A13). In the second, the court of appeals affirmed orders of the district court directing execution on petitioner's "book-entry" Treasury bills to satisfy the judgment (Pet. App. A14-A26). The Secretary of the Treasury is not a party to the first proceeding and expresses no views with respect to that aspect of the petition.

With respect to the second proceeding, petitioner contends (Pet. 20-23) that regulations of the Department of the Treasury prohibit the district court from subjecting his book-entry Treasury bills to execution and judicial process. This claim is insubstantial for the reasons stated by the court of appeals (Pet. App. A22-A25).

31 U.S.C. 754(a) authorizes the Secretary of the Treasury to borrow money for the United States by issuing Treasury bills "under such regulations and upon such terms and conditions as the Secretary * * * may prescribe * * *." Under this authority, the Secretary issues and sells so-called "book-entry" Treasury bills from time to time subject to regulations set forth at 31 C.F.R. Part 349 and the announcements made by the Secretary prior to each issue. Those regulations expressly provide (at 31 C.F.R. 349.2) that book-entry Treasury bills are subject "to the extent applicable" to 31 C.F.R. Part 306, the general regulations governing United States securities. 31 C.F.R. 306.100 states that the Secretary will recognize judicial process "affecting the ownership of or interest in transferable securities," given evidence of a final judgment. This latter regulation is unquestionably valid. See *Free* v. *Bland*, 369 U.S. 663, 670 (1962). The Secretary's determination that the regulation subjecting securities to judicial process is applicable to book-entry Treasury bills is a reasonable construction of his own regulation and is entitled to substantial deference. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 n.6 (1940); *Udall* v. *Tallman*, 380 U.S. 1, 18 (1965); *Northern Indiana Public Service Co.* v. *Izaak Walton League*, 423 U.S. 12, 15 (1975).

Petitioner relies on an expansive reading of 31 C.F.R. 350.16(b) to insulate his book-entry account from judicial process. That section, however, provides that the Treasury will not accept "notices" of pending judicial proceedings in favor of creditors. As the court of appeals held (Pet. App. A23-A24), Section 350.16(b) simply disclaims any binding effect of a mere notice of a pending judicial proceeding against a book-entry account owner. It does not purport to suspend the general rule subjecting securities to execution after final judgment.

Petitioner also contends (Pet. 21) that Part 306 (allowing execution) is incorporated only to the extent it is "applicable" and that it is not applicable because Part 306 concerns "transferable securities." This argument falls of its own weight, for it reduces to a nullity the express incorporation of Part 306 in 31 C.F.R. 349.2 inasmuch as essentially all of Part 306 relates to transferable securities. In any event, book-entry Treasury bills are transferable securities as defined in 31 C.F.R. 306.2(q) (see Merrill Lynch Br. in Opp. 18-19).

In sum, petitioner argues for a construction that would "create a sanctuary for judgment debtors" (Pet. App. A23). The court of appeals properly rejected this result.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

AUGUST 1979

DOJ-1979-08